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SINGLE APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION,
CENTRAL OF GEORGIA RAILWAY COMPANY,
and SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR CERTIORARI FILED MARCH 21, 1973
CERTIORARI GRANTED MAY 14, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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NATIONAL RAILROAD PASSENGER CORPORATION,
CENTRAL OF GEORGIA RAILWAY COMPANY,
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DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DATE	PROCEEDINGS

1971

Apr. 26—Complaint, appearance Exhibit filed

Apr. 26—Summons, copies (3) and copies (3) of Complaint issued

Apr. 27—Motion of pltf. for temporary restraining order; P & A; affidavit; exhibits A, B, C, D & E; C/S 4-27-71; M.C. filed

Apr. 28—Memorandum of defts. in opposition to pltf's motion for temporary restraining order; affidavit; exhibits A, B, C, D & E; c/m 4-28-71; M.C. filed

Apr. 29—Motion of pltf. for temporary restraining order, heard and taken under advisement. (Rep: K. Byrholdt) Pratt, J.

May 5—Order denying motions of pltf. for temporary restraining order and temporary injunction and dismissing cause. (N) Pratt, J.

Jun. 4—Notice of appeal by pltf. from order of May 5, 1971; copies mailed to Charles A. Horsky, William D. Iverson, Hogan & Hartson, James A. Bistline and Earl E. Eisenhart; deposit by MacDougall $5.00 filed.

Jul. 7—Record on appeal delivered to USCA; deposit by Mr. MacDougall 80 cents.

Jul. 7—Receipt from USCA for Original Record. filed

1973

Feb. 15—Letter dated 2-13-73 from Clerk, USCA to Clerk, USDC advising that mandate in this case has been stayed until final disposition by Supreme Court if a petition for Cert. is filed.

DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS—PROCEEDINGS

7-9-71—Certified Original Record (containing One Envelop of Exhibits) (No transcripts) (n-4)

7-12-71—4-Appellant's motion to consolidate with 71-1321, 71-1322 and 71-1323

7-22-71—4-Response of National Railroad Passenger Corporation to motion to consolidate (m-22)

7-29-71—Per Curiam Order consolidating with No. 71-1321 for all purposes. Robb and Wilkey, CJ's.

8-18-71—25-Appellant's brief (m-18)

9-10-71—4-Motion of appellee National Railroad Passenger Corporation to extend time to October 21st (p-10)

9-14-71—4-consent of Central of Georgia and Southern Railway Companys to motion of NRPC to extend time to file brief (m-13)

9-14-71—4-Appellant's opposition to motion to extend time to file brief (p-13)

9-15-71—Per order of CJ Bazelon granting appellee (National Railroad Passenger Corp.) motion to extend time to file brief to October 21st; no further extensions will be granted except for extraordinary cause shown

9-20-71—25-Appellee's brief (m-20)

9-23-71—4-Appellant's motion to enlarge time to file reply brief to October 4th (M-23)

10-27-71—Order per CJ Bazelon extending time to file appellant's reply brief to 14 days from service date of brief of appellee National Railroad Passenger Corporation

DATE FILINGS—PROCEEDINGS

10-21-71—25-Appellee's brief and appendix (National Railroad Passenger Corp. (m-21)

11-4-71—25-appellants' reply brief (m-4)

11-5-71—4-appellant's motion to correct reply brief (m-5)

11-10-71—Clerk's order granting appellant's motion to correct brief

11-12-71—4-appellant's motion to advance for oral argument (m-11)

12-6-71—Per Curiam order denying appellant's motion in No. 71-1321 to advance for oral argument. McGowan and Tamm, CJ

2-3-72—4-Appellant's motion to advance for oral argument (m-3)

3-7-72—Per Curiam order denying appellants' motion to advance argument; CJ McGowan and Tamm, CJ

8-25-72—4-Appellants' motion for leave to file supplemental appendix to brief in typewritten form (m-24)

9-1-72—Order per CJ Bazelon granting motion of Potomac Passengers Asso. and National Asso. of Railroad Passengers for leave to file a supplemental Appendix to their briefs in typewritten form; Clerk is directed to file as a supplemental appendix to appellants brief the lodged opinion in Wood v. National Railroad Passenger Corp. Civil No. 14819, U.S. District Court, D. Connecticut January 19, 1972

9-1-72—3-Opinions supplemented to brief (opinion in Wood v. National Railroad Passenger Corp. Civil No. 14819)

9-7-72—4-Motion of appellee National Railroad Passenger Corporation for leave to file supplemental appendix to brief in typewritten form (p-7)

DATE FILINGS—PROCEEDINGS

9-8-72—Argued before CJ Bazelon, Wright and Wilkey, CJ; the case was called for hearing on the record from the District Court and on appellee National Railroad Passenger Corp. for leave to file a supplemental appendix to brief in typewritten form; the Court granted Mr. William O. Bittman leave to file a supplemental memorandum by September 22, 1972 and granted counsel for appellants' leave to file an answer within 7 days from the date of filing of Mr. Bittman's memorandum; the Court further granted counsel for appellants' leave to lodge certain papers with the Clerk

9-22-72—4-Supplemental memorandum of Appellee National Railroad Passenger Corp. (p-22)

9-26-72—Per Curiam order granting motion of National Association of Railroad Passengers for leave to file a supplemental appendix to its brief in typewritten form; Clerk is directed to file a supplemental appendix; CJ Bazelon, Wright and Wilkey, CJ

9-26-72—1-Supplemental to appendix (m-7)

9-29-72—4-Appellant's reply to supplemental memorandum (m-29)

1-5-73—Opinion by Circuit Judge Wright.

1-5-73—Judgment reversing and remanding case to the District Court. (n)

1-10-73—Per Curiam order by the Clerk sua sponte amending opinion of January 5, 1973.

1-18-73—4-appellants' motion to extend time to file verified bill of costs to January 25th (m-18)

1-22-73—4-Appellants' motion to withdraw motion to extend time to file bill of costs (m-22)

1-23-73—4-Appellees' motion for stay of mandate (p-23)

DATE FILINGS—PROCEEDINGS

1-24-73—4-Appellant's reply to motion for stay of mandate (m-24)

1-26-73—4-Appellees' further reply to objection to motion for stay of mandate (p-26)

2-5-73—4-Appellant's reply to appellees' further reply to objection to motion for stay of mandate (m-31)

2-9-73—Per Curiam order that Clerk is directed to stay the issuance of this Court's mandate in No. 71-1546 to March 11th; the stay is granted herein shall be subject to the provisions of Rule 41 (b) of the FRAP; CJ Bazelon and Wright and Wilkey, CJ

2-28-73—4-Appellee's motion to extend time to stay of Mandate to March 22nd (p-28)

3-9-73—Per Curiam order granting appellees' motion to extend the stay of mandate to March 22, 1973; and the Clerk is directed to stay the issuance of this Court's mandate until March 22, 1973; the stay granted herein shall be subject to the provisions of Rule 41 (b) of the FRAP; CJ Bazelon, and Wright and Wilkey, CJ

3-21-73—Certified copy of order of Supreme Court informing the Clerk of the docketing of case in S.C. No# 72-1289

3-21-73—Notice of filing Petition for Certiorari filed March 21, 1973 in case No# 71-1546

(S)5-21-73—Certified copy of Supreme Court granting certiorari on May 14, 1973 in SC # 72-1289

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 831-71

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Plaintiff*,
417 New Jersey Ave., S.E.
Washington, D.C. 20003

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Defendant*
920 15th St., N.W.
Washington, D.C. 20005

SOUTHERN RAILWAY COMPANY, *Defendant*
920 15th St., N.W.
Washington, D.C. 20005

NATIONAL RAILROAD PASSENGER CORPORATION, *Defendant*
900 L'Enfant Plaza
Washington, D.C. 20024

Complaint for Injunction

I.

Plaintiff National Association of Railroad Passengers is a not-for-profit corporation comprised of railroad patrons, chartered in the State of Illinois, and with its principal office located in Washington, D.C. Plaintiff has approximately 7,000 dues-paying members, and performed a leading role in the enactment on October 30, 1970 of *Rail Passenger Service Act of 1970*, 45 U.S.C. 501.

II.

Defendant Central of Georgia Railway Company has its principal office at 920 15th Street, Washington, D.C., and in conjunction with a number of railroads comprising the Southern Railway System, operates (1) a pair of passenger trains daily between Atlanta and Savannah, Ga., known as

the Nancy Hanks, a distance of 290.5 miles in each direction, and (2) a pair of trains every-other-day between Albany, Ga. and Birmingham, Ala., known as trains Nos. 13 & 14, a distance of 250.5 miles in each direction.

III.

Defendant Southern Railway Company has its principal office at 920 15th Street, Washington, D.C., and is the principal component of a group of railroads known as the "Southern Railway System", which railroads are:

	Miles
Southern Railway Company	6,026
Central of Georgia Railway Company	1,729
The Alabama Great Southern Railroad Company	528
The Cincinnati, New Orleans and Texas Pacific Railway Company	415
Savannah & Atlanta Railway Company	167
All others	1,287
Less jointly Used Mileage	(397)
System	10,209

Southern Railway Company owns 99.06 percent of the capital stock of the Central of Georgia Railway Company. The 1969 reports of Southern Railway Company and Central of Georgia Railway Company show that W. Graham Claytor, Jr. is President of Southern and Chairman of Central; The Vice-President Operations is the same for both carriers, as are the vice-presidents for Sales, Marketing & Planning, Finance, Accounting, and most other officers are in common.

IV.

Southern Railway Company and Central of Georgia Railway Company publish a common passenger train schedule for the public, which is attached hereto as Appendix 1.

V.

Defendant National Railroad Passenger Corporation is located at 900 L'Enfant Plaza, Washington, D.C. It was established pursuant to P.L. 91-518, *Rail Passenger Service Act of 1970*, 45 U.S.C. 501. Upon information and belief, National Railroad Passenger Corporation proposes to contract with Central of Georgia Railway Company, pursuant to the provisions of section 401(a)(1), 45 U.S.C. 561(a)(1), so that the "Nancy Hanks" and passenger trains Nos. 13 & 14 may be discontinued May 1, 1971, and that Central of Georgia Railway Company has filed a notice pursuant to section 401(a)(1) proposing to discontinue these trains effective May 1, 1971. On the other hand, Southern Railway Company does not propose to contract with National Railroad Passenger Corporation pursuant to section 401(a)(1), so as to relieve the former of its obligations to provide intercity rail passenger service.

National Railroad Passenger Corporation has announced that it does not intend to operate the "Nancy Hanks" or Central of Georgia's trains Nos. 13 & 14 after May 1, 1971. Accordingly, as matters now stand, Central of Georgia Railway Company will cease all intercity passenger train operations effective May 1, 1971, whereas Southern Railway Company will continue to operate all of its intercity passenger train service at least until March 1, 1973.

VI.

Defendants Central of Georgia Railway Company, Southern Railway Company, and National Railroad Passenger Corporation, if permitted to contract under section 401(a)(1) of Rail Passenger Service Act of 1970 for the elimination of part of the intercity passenger service obligations of the Southern Railway System, would violate the terms of the aforesaid section 401(a)(1) in that the statute requires that contracts embrace the "entire" responsibility of the railroad.

The chief officer of Central of Georgia Railway Company and Southern Railway Company testified June 4, 1970 before the U.S. House Committee on Interstate & Foreign Commerce concerning the proposed Rail Passenger Service Act of 1970, and referred throughout to the "Southern Railway System" as a 10,000-mile system, and specifically mentioned passenger train service between Atlanta and Savannah, Ga. Hearings on H.R. 17849, *Passenger Train Service*, 91st Cong., 2d Sess. (Ser. No. 91-62).

The action of Central of Georgia Railway Company, Southern Railway Company and National Railroad Passenger Corporation, would operate to defeat the purpose of the Rail Passenger Service Act of 1970, which is to create a National Railroad Passenger Corporation which would be responsible for providing all intercity rail passenger service. House Report No. 91-1580, *Passenger Train Service*, 91st Cong., 2d Sess., 1 (1970). The "partial" discontinuance of Southern Railway System passenger service would violate sections 404(a) and 802 of the Act, 45 U.S.C. 564(a) and 642.

VII.

This action is brought pursuant to 28 U.S.C. 1331, 1337 and 45 U.S.C. 501 et seq., and particularly sections 564(a) and 642 of Title 45.

VIII.

The travelling public would be irreparably injured if the Southern Railway System is allowed to discontinue the operation of the "Nancy Hanks" between Atlanta and Savannah, Ga. as proposed on May 1, 1971. National Association of Railroad Passengers has a number of members in the affected area of the State of Georgia who would suffer from any discontinuance of the "Nancy Hanks", which is the sole passenger train on the Atlanta-Macon-Savannah run.

IX.

WHEREFORE, plaintiff respectfully prays:

1. That process issue against Central of Georgia Railway Company, Southern Railway Company and National Railroad Passenger Corporation.

2. That a temporary restraining order issue against Central of Georgia Railway Company and Southern Railway Company, so as to prevent the discontinuance of intercity passenger train service presently being provided by Central of Georgia Railway Company, pending hearing on a preliminary injunction.

3. That a preliminary injunction issue against Central of Georgia Railway Company and Southern Railway Company, so as to prevent the discontinuance of intercity passenger train service presently being provided by Central of Georgia Railway Company, pending hearing on a permanent injunction.

4. That after hearing and determination of the merits of this action, a permanent injunction issue against Central of Georgia Railway Company, Southern Railway Company, and National Railroad Passenger Corporation, restraining them from enforcing any contract, entered into pursuant to section 401(a)(1) of Rail Passenger Service Act of 1970, which does not include all of the passenger train service operated by the Southern Railway System, including Central of Georgia Railway Company, and that no passenger train service of an intercity nature be discontinued by defendants pending the inclusion of all constitutent subsidiaries and affiliates of the Southern Railway System. Further, that plaintiff have such other relief as to the Court may be fit and proper.

GORDON P. MACDOUGALL
705 Ring Building
Washington, D.C. 20036
Tel: 223-9738
Attorney for Plaintiff

April 26, 1971

[Verification Omitted in Printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 831-71

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Plaintiff*,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY and NATIONAL RAILROAD PASSENGER CORPORATION, *Defendants*.

Motion for Temporary Restraining Order

Plaintiff moves the Court for a temporary restraining order, enjoining and suspending the proposed discontinuance by Central of Georgia Railway Company and Southern Railway Company of their passenger train service known as the "Nancy Hanks", between Atlanta and Savannah, Ga.

GORDON P. MACDOUGALL
705 Ring Building
Washington, D.C. 20036
Attorney for Plaintiff

April 27, 1971

Memorandum of Points and Authorities in Support of Temporary Restraining Order

This action was instituted April 26, 1971 to promptly enjoin an anomalous situation whereby the Southern Railway System has elected to have part of its system join the new National Railroad Passenger Corporation, and to have another part of its system stay out of the national passenger train network.

Plaintiff is the National Association of Railroad Passengers, a not-for-profit corporation composed of railroad users and patrons, which was primarily responsible for enactment of *Rail Passenger Service Act of 1970*, 84 Stat. 1327, 45 U.S.C. 501, 39 Law Week 67. Defendants are two of the several components of the Southern Railway System, together with National Railroad Passenger Corporation (Amtrack).

Rail Passenger Service Act of 1970 provides that a railroad may contract with the National Railroad Passenger Corporation (Amtrack) so as to relieve the railroad of all responsibility to perform intercity rail passenger service. Section 401(a)(1) of the law provides that "all" service must be contracted. The Congressional intent is set forth in the House report. *Passenger Train Service*, House Rept. No. 91-1580, 91st Cong., 2d Sess. (1970) at p. 1:

> "The basic purpose of this bill is to prevent the complete abandonment of intercity rail passenger service and to preserve a minimum of such service along specific corridors. This is to be accomplished by creating a National Railroad Passenger Corporation which would be responsible for providing all intercity rail passenger service."

Section 401(a)(1) of the law provides, 45 U.S.C. 561(a)(1):

> "On or before May 1, 1971, the Corporation is authorized to contract and, upon written request therefor from a railroad, shall tender a contract to relieve the

railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service .... Upon its entering into a valid contract (including protective arrangements for employees), the railroad shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under part I of the Interstate Commerce Act or any State or other law relating to the provision of intercity passenger service: *Provided*, That any railroad discontinuing a train hereunder must give notice in accordance with the notice procedures contained in section 13a(1) of the Interstate Commerce Act."

THE POSITION OF SOUTHERN RAILWAY SYSTEM

As shown by the Complaint and Affidavit of Anthony Haswell, Southern Railway System proposes that one of its constitutent lines join the National Railroad Passenger Corporation, but that the other constitutent lines remain outside the new corporation. The Central of Georgia Railway Company, which is 99% owned by Southern Railway Company, would join Amtrack. It operates the "Nancy Hanks" between Atlanta and Savannah, daily in each direction, and also operates a pair of trains known as Nos. 13 & 14 between Birmingham, Ala. and Albany, Ga. every-other-day in each direction. Southern Railway System proposes that the Central of Georgia Railway Company would discontinue all of its passenger service, because the National Railroad Passenger Corporation has elected not to contract with Central of Georgia Railway Company for the operation of any of its trains as part of the national network.

On the other hand, Southern Railway Company does not propose to join National Railroad Passenger Corporation. It would thus be required to operate its passenger trains at least until March, 1973. Southern Railway Company operates three pairs of trains, as shown in Appendix 1 to the Complaint. These trains operate over a route between

Washington, D.C.-Atlanta-Birmingham-New Orleans. The Secretary of Transportation, John A. Volpe, on January 28, 1971 designated New York-New Orleans service as that which must be operated by National Railroad Passenger Corporation, unless the service is provided by a railroad electing not to join National Railroad Passenger Corporation. The Secretary of Transportation gave National Railroad Passenger Corporation a choice of routes between Washington, D.C. and New Orleans. However, the new corporation has elected not to utilize the routes and services of railroads which have contracted pursuant to section 401(a)(1), but will rely upon Southern Railway Company to provide the transportation set forth by the Secretary of Transportation, as allowed by section 401(b)(i).

A Temporary Restraining Order Is Necessary

By permitting Southern Railway System to select certain passenger service for inclusion within National Railroad Passenger Corporation, and other lines for exclusion, National Railroad Passenger Corporation is defeating one of the major objectives of the new legislation. Congress desired that all railroads would join the new corporation. The requirement of section 401(a)(1) that the "entire" service be contracted for, places pressure upon a railroad system to join the corporation. Here, National Railroad Passenger Corporation would allow Southern Railway System to "join" the corporation with respect to trains which are not slated for continued operation under the basic national network, thus permitting discontinuance, but allow Southern Railway System to stay out of the new corporation with respect to trains which otherwise might be operated as part of the national network. The situation would deprive the new corporation of needed revenues. It should be noted that the heavy population density lies at Washington, D. C. and north thereof, with through service between New York and the South. Thus trains of National Railroad Passenger Corporation would be feeding South-

ern's trains with interline revenues. The public interest would be damaged if the "partial" contract between Southern and National Railroad Passenger Corporation is allowed to be effectuated.

Plaintiffs have a reasonable—indeed high—probability of success on the merits. The testimony of Southern's chief officer before the House committee illustrates that there is one Southern Railway System. (Affidavit of Haswell, Exhibit E).

Another indicator of success on the merits is the Senate Committee report on the legislation, where a report on passenger costs is included. That report treats the Southern Railway System as a single entity for cost purposes. Sen. Rept. No. 91-765, *Rail Passenger Service Act of 1970,* 91st Cong., 2d Sess., 110 (1970).

The Southern Railway System is operated under a common management and control among its constituent parts. The principal officers of Southern Railway Company and Central of Georgia Railway Company serve both companies in common from System headquarters located in Washington, D. C.

Plaintiff will suffer irreparable injury if the "Nancy Hanks" is discontinued effective May 1, 1971. This train provides the only rail service between Atlanta-Macon-Savannah.

CONCLUSION

A temporary restraining order should issue to prevent discontinuance of the "Nancy Hanks" passenger train pending hearing and determination of plaintiff's request for a preliminary and for a permanent injunction.

Respectfully submitted,

GORDON P. MACDOUGALL
705 Ring Building
Washington, D. C. 20036
Attorney for Plaintiff

April 27, 1971

Affidavit of Anthony Haswell

DISTRICT OF COLUMBIA, SS:

ANTHONY HASWELL, being duly sworn, deposes and says:

1. I am Chairman of the National Association of Railroad Passengers, an organization of consumers and users of rail passenger service, with approximately 7,000 dues-paying members. NARP is an Illinois not-for-profit corporation whose office and principal place of business is located at 417 New Jersey Avenue, S.E., Washington, D. C. 20003.

2. NARP's goal is to obtain modern rail passenger service within and between all regions of the United States. Its specific objectives and activities in furtherance thereof are set forth in detail in the brochure, "Why—in the 1970's do we need rail passenger service?", which is attached to this affidavit as Exhibit A.

3. For the year 1970, NARP's major legislative project was P.L. 91-518, which was approved by the President of the United States on Friday, October 30, 1970. NARP assisted with this legislation both in testimony at public hearings and in consultation with Congressional Committee staffs at various stages of the drafting process. NARP strongly supports the concept and objectives of P.L. 91-518, which provides for a national corporation to operate intercity rail passenger service.

4. I am informed and believe that on and after Saturday, May 1, 1971, at 12:01 a.m., Southern Railway System will discontinue the service of its "Nancy Hanks" passenger trains (Nos. 7 & 8) between Atlanta and Savannah, Ga., and its trains Nos. 13 & 14 between Birmingham, Ala. and Albany, Ga. Attached hereto as Exhibit B is the schedule of Central of Georgia service, consisting of four pages from the November, 1970, *Official Guide of the Railways.* Page 191 shows that the principal general office and most officials of Central of Georgia are located in Washington,

D. C. at Southern Railway Company headquarters. Reference is made to the "Southern Railway System Map." For "Other Departments", the reader is directed to Southern Railway System. The Southern Railway System symbol appears on page 193.

Attached as Exhibit C is a six-page listing from the same issue of *Official Guide of the Railways,* with respect to Southern Railway Company. Comparison of Exhibit B with Exhibit C shows that most officers are common to both companies.

Attached as Exhibit D is the Southern Railway Company Annual Report for the year 1970. I direct particular attention to pages 2, 26, 27, 28, 29, in which the financial results of Southern Railway Company, Central of Georgia Railway Company and other subsidiaries are reported to shareholders on a system-wide consolidated basis. The inside back cover of Exhibit D indicates that Central of Georgia Railway Company is a consolidated subsidiary of Southern Railway Company, with over 99 percent stock control by Southern Railway Company. The back cover of Exhibit D illustrates the Southern Railway System, and makes clear that Central of Georgia is an integral part thereof.

5. The Complaint in this action illustrates other indicia showing that Central of Georgia Railway Company is part of the Southern Railway System. Southern Railway Company was authorized to acquire Central of Georgia Railway Company by the Interstate Commerce Commission in 1962. *Southern Railway Company—Control—Central of Georgia Railway Company,* 317 I.C.C. 557.

6. P.L. 91-518 provides that any railroad wishing to rid itself of the obligation to provide intercity passenger service must join the new National Railroad Passenger Corporation. To the extent that railroads can minimize their contributions to the new corporation by only having one or more of their subsidiary or affiliate railroads join the

new corporation, incentive to join the corporation will be correspondingly reduced, thus frustrating the intent of Congress to provide for a unified national network of passenger service operated by the corporation.

7. I am informed and believe that Southern Railway Company, and other railroad companies within the Southern Railway System (other than Central of Georgia Railway Company) do not intend to join the new corporation by the execution of contracts as provided for by section 401(a)(1) of P.L. 91-518. On the other hand, I am informed and believe that Central of Georgia Railway Company does intend to join the new corporation, and that the discontinuances proposed by the Central of Georgia are pursuant to a proposed section 401(a)(1) contract, in as much as the new corporation does not intend to operate any trains over any route embracing the Central of Georgia Railway Company.

8. I testified before the House Interstate & Foreign Commerce Committee of the U. S. Congress on H.R. 17849, as did W. Graham Claytor, Jr., the latter on behalf of the Southern Railway System. Exhibit E is a copy of the Committee hearings, the only hearings held specifically on what became Rail Passenger Service Act of 1970. I call attention to page 156, et seq., where Mr. Claytor specifically referred to the Atlanta-Savannah service as part of his railroad—the eighth railroad in size in the United States.

/s/ Anthony Haswell
Anthony Haswell

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 831-71

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Plaintiff*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, NATIONAL RAILROAD PASSENGER CORPORATION, *Defendant.*

Order

This case having been heard on motions for a temporary restraining order and a temporary injunction, and it appearing to the Court (1) that the plaintiff does not having standing to maintain this action under Section 307 of the Rail Passenger Act of 1970 (P.L. 91-518), and (2) that in any event plaintiff has not demonstrated a substantial likelihood of success on the merits of its claim, it is therefore

ORDERED, that the motions be and they are hereby denied, and the cause is hereby dismissed.

/s/ JOHN H. PRATT, J.

May 5, 1971

No objection as to form:
/s/ GORDON P. MACDOUGALL
Counsel for Plaintiff

[Court of Appeals Opinion]
(475 F.2d 325)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1321

POTOMAC PASSENGERS ASSOCIATION, APPELLANT

v.

CHESAPEAKE & OHIO RAILWAY COMPANY AND BALTIMORE & OHIO RAILROAD COMPANY

No. 71-1546

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, APPELLANT

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY AND NATIONAL RAILROAD PASSENGER CORPORATION

Appeals from the United States District Court
for the District of Columbia

Decided January 5, 1973

Messrs. Pierre E. Dostert and *Gordon P. MacDougall* for appellants.

Mr. Charles A. Horsky, with whom *Mr. William D. Iverson* was on the brief, for appellees Central of Georgia Railway Company and Southern Railway Company.

Mr. William O. Bittman, with whom *Mr. Curtis E. von Kann* was on the brief, for appellee National Railroad Passenger Corporation.

Mr. Robert O. Smith, Jr. was on the brief for appellees Chesapeake & Ohio Railway Company and Baltimore & Ohio Railroad Company. *Messrs. Francis M. Shea* and *Richard T. Conway* also entered appearances for appellees in No. 71-1321.

Before BAZELON, *Chief Judge,* and WRIGHT and WILKEY, *Circuit Judges.*

WRIGHT, *Circuit Judge:* This consolidated appeal consists of two separate cases, each concerning interpretation of the recently enacted Rail Passenger Service Act of 1970, 45 U.S.C. § 501 *et seq.* (1970) (hereinafter referred to as the Amtrak Act). These cases were initially consolidated because it appeared that they presented the same or closely related legal issues, namely (1) whether parties other than the Attorney General, employees and employee representatives have standing to sue the National Rail Passenger Service Corporation (hereinafter Amtrak) or individual railroads for violations of the Amtrak Act; (2) whether federal district courts have jurisdiction over suits brought by litigants other than the Attorney General, employees and employee representatives to enjoin Amtrak or individual railroads from violating the Amtrak Act; and (3) whether the Amtrak Act creates a private right of action in favor of parties injured by violations of the Act.

It now appears, however, that the appeal in No. 71-1321 involves a question much different from those listed above,

namely: Does a federal district court have jurisdiction to determine whether a specific train provides "intercity rail passenger service" or "commuter and other short-haul service" within the meaning of the Amtrak Act? If the train provides "intercity rail passenger service" it may properly be discontinued under the authority of the Amtrak Act without any review by the regulatory commissions of the states through which it passes or by the Interstate Commerce Commission. If it provides "commuter and other short-haul service," on the other hand, its discontinuance is neither authorized nor prohibited by the Amtrak Act, but rather is subject to the pre-existing jurisdiction of state regulatory commissions or the ICC. To avoid any further confusion between the issues involved in these two cases, our opinion will treat each case separately.

No. 71-1546

This case requires us to decide whether injured and aggrieved parties have standing to seek injunctions against violations of the Amtrak Act, or whether Section 307 of the Act, 45 U.S.C. § 547, bars suits by all parties other than the Attorney General of the United States, employees and employee representatives. Since the case is here on an appeal from a dismissal for lack of standing to sue and the District Court never reached the merits, we may accept plaintiff's-appellant's version of the facts. Appellee Central of Georgia Railway Company (Central) filed a notice of discontinuance [1] for its "Nancy Hanks" passen-

[1] The Act requires that railroads discontinuing trains give notice in accordance with the notice procedures in § 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1) (1970). *See* 45 U.S.C. § 561(a)(1) (1970). Since the purpose of the Act is to allow discontinuances of intercity rail passenger service without approval of either the ICC or state regulatory agencies, this notice does not invoke the jurisdiction of the ICC; it merely serves to give passengers advance warning

ger train which operates between Savannah and Atlanta, Georgia, and for two other trains operating between Albany and Birmingham, Georgia. Appellant National Association of Railroad Passengers, a national organization of railroad patrons, sought to enjoin the discontinuances on the ground that they violated Sections 404(a) and 802 of the Amtrak Act, 45 U.S.C. §§ 564(a) and 642.

Section 802 provides that "no railroad may discontinue any intercity rail passenger service whatsoever other than in accordance with the provisions of this chapter • • •." Section 404(a) bars a railroad from discontinuing any of its intercity passenger trains prior to January 1, 1975, unless that railroad has entered into a contract with Amtrak pursuant to Section 401(a)(1) of the Act, 45 U.S.C. § 561(a)(1). The latter provision authorizes Amtrak to contract with a railroad "to relieve the railroad • • • of its entire responsibility for the provision of intercity rail passenger service." Although Central has entered into a contract with appellee Amtrak to relieve Central of its entire responsibility for intercity rail passenger service, appellant contends that Central and Amtrak have not complied with Section 401(a)(1) because Central is but a subsidiary of appellee Southern Railway Company (Southern) which has not entered into a contract with Amtrak. In appellant's view, then, the Act requires that Amtrak either enter into a contract to relieve Southern of its entire responsibility for intercity rail passenger service or enter into no contract at all. After oral argument on appellant's motion for a temporary restraining order, the District Court dismissed the action on the ground that appellant did not have standing to maintain this action under Section 307 of the Act. We reverse and remand.

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of the discontinuance. *See* Ex Parte Order No. 217, 36 FED. REG. 5219, 5220 (March 18, 1971); 49 C.F.R. § 1122.9 (Oct. 1, 1972).

I

The parties have suggested several characterizations of the issue presented. Appellant accepts the "standing" characterization employed by the District Court. Central and Southern suggest that this is incorrect and that the real issue is whether a private right of action exists to restrain an alleged violation of the Amtrak Act. Amtrak suggests that the issues are, first, whether the District Court has jurisdiction to entertain this action at the instance of this plaintiff and, second, whether the action of Amtrak and the railroads is reviewable at the behest of this plaintiff.

The fine distinctions among the doctrines of standing, jurisdiction, reviewability, and causes of action often pose thorny problems for the law. *Compare Data Processing Service* v. *Camp*, 397 U.S. 150 (1970), *with Barlow* v. *Collins*, 397 U.S. 159, 167 (Mr. Justice Brennan, concurring in the result and dissenting). *Compare Bell* v. *Hood*, 327 U.S. 678, 679 (1946) (majority opinion), *with id.* at 685 (Mr. Chief Justice Stone, dissenting). Fortunately, however, we need not resolve these problems here, for in this case analysis of all these doctrines leads to the same conclusion—allowing adjudication of the merits. Our opinion focuses on standing, but we will also demonstrate that analyzing the case under the doctrines of jurisdiction, reviewability, and private causes of action achieves an identical result.

II

At the outset, we reject the position that the doctrine of standing is wholly inapplicable to this case. It is argued that the standing doctrine has developed solely in the context of determining what persons or groups may challenge the action of a government official or agency, a matter not involved in this case since the Amtrak Act specifically provides that Amtrak is not an agency or instrumentality of

the federal government. *See* 45 U.S.C. § 541. Most applications of the doctrine of standing, it is true, involve review of administrative agencies. *See, e.g., Data Processing Service* v. *Camp*, *supra; Barlow* v. *Collins, supra; Sierra Club* v. *Morton*, 405 U.S. 727 (1972). However, the doctrine is by no means limited to such situations. The question of standing arises in determining who is a proper plaintiff to adjudicate the constitutionality of statutes and ordinances. *See Flast* v. *Cohen*, 392 U.S. 83 (1968); *Baker* v. *Carr*, 369 U.S. 186, 204-208 (1962); *City of Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U.S. 77 (1958). More relevant to our own case, standing has been recognized as an issue in determining who is a proper plaintiff to assert that a corporation created by the Government is violating its statutory authority. *See Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968).

A. *The applicable standard.*

Recent Supreme Court cases have announced a three-part test to determine whether a plaintiff has standing to seek judicial review of administrative action. As set forth in *Data Processing, supra,* those tests are: (1) whether the plaintiff has alleged that he suffered injury in fact, economic or otherwise, 397 U.S. at 152; (2) whether the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question, 397 U.S. at 155-156; and (3) whether judicial review has been precluded by the legislature, 397 U.S. at 156. *See also Barlow* v. *Collins, supra,* 397 U.S. at 164-165. It appears from *Data Processing,* a case involving review of administrative action, that this tripartite test represents both a formulation of Article III's "case" or "controversy" requirement [2] and an interpretation of the Administrative Procedure Act (APA),

[2] The Supreme Court's most recent cryptic pronouncement on standing seems to indicate that the standing test may be

5 U.S.C. §§ 701(a)(1) and 702 (1970). *See Data Processing Service* v. *Camp, supra,* 397 U.S. at 153, 156. *See also Barlow* v. *Collins, supra,* 397 U.S. at 169-170, 173-175 (Mr. Justice Brennan, concurring in the result and dissenting). The question arises, then, whether the same tripartite test should govern standing to sue a corporation that is neither an agency of the federal government nor subject to the APA.

Public policy favors adopting a standing test as liberal as that which has arisen in the administrative law context to determine whether a given plaintiff can sue a congressionally created corporation to enjoin it from violating its enabling statute. A significant aspect of recent standing decisions is a recognition that judicial review is necessary to ensure the integrity of federal regulatory programs, an integrity that is violated as much when a corporation created by the Government violates its enabling act as when a Government agency violates the law. *See Ballerina Pen Co.* v. *Kunzig,* 140 U.S.App.D.C. 98, 102 n.8, 433 F.2d 1204, 1208 n.8 (1970), *cert. dismissed,* 401 U.S. 950 (1971). What we said there with respect to administrative agencies is also pertinent to judicial overview of the actions of Government-created corporations:

> "• • • Logic tells us that Congress lays down the statutory framework within which the various agencies it establishes are to operate with very definite goals in mind—the agencies are designed to function according to the will of Congress; they are not given life, breadth and scope of their own to function as they see fit; rather, they must function as Congress intended them to function. • • •"

140 U.S.App.D.C. at 101-102, 433 F.2d at 1207-1208.

It is also important to note that, while the Amtrak Act states that Amtrak is not a Government agency, the cor-

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based solely on the APA. *See Sierra Club* v. *Morton,* 405 U.S. 727, 732 n.3 (1972). *See also* note 10 *infra.*

poration has several features making it, in the words of the Secretary of Transportation, "quasi-public."[3] For example, a majority of the corporation's board of directors is appointed by the President. 45 U.S.C. § 543(a). The corporation received its initial financing from the United States Treasury, *see* 45 U.S.C. § 601, and continued financing is facilitated through Government guarantees on corporate obligations, *see* 45 U.S.C. § 602. Amtrak's books and records are to be audited by the Comptroller General of the United States, *see* 45 U.S.C. § 644(2)(A), and the results of audits are to be made available to the Congress, *see* 45 U.S.C. § 644(2)(B). Because of Amtrak's quasi-public character, and the consequential public interest in ensuring that its actions conform to its legislative mandate, we conclude that the liberal tripartite standing test developed by the Supreme Court in the administrative agency context should be used to determine whether appellant has standing to seek judicial review of actions by Amtrak allegedly in violation of its enabling act.

B. *Application of the* Data Processing *standing test to this case.*

The first two tests are easily satisfied. With respect to the injury in fact requirement, the National Association of Railroad Passengers alleged in its complaint that it has a number of members in the affected area of the State of Georgia who would suffer from any discontinuance of the Nancy Hanks. *Compare Sierra Club* v. *Morton, supra.* The interest sought to be protected by the Association is clearly within the zone of interests to be protected by the Amtrak Act. That railroad passengers were the intended benefici-

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[3] Supplemental Hearings on H.R. 17849 & S. 3706 Before Subcommittee on Transportation & Aeronautics, House Committee on Interstate & Foreign Commerce, 91st Cong., 2d Sess., at 67-68 (1970) (hereinafter cited as Supplemental Hearings).

aries of the Act is obvious from the congressional findings and declaration of purpose in Section 1 of the Act, 45 U.S.C. § 501:

> "The Congress finds that modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country; * * * that the traveler in America should to the maximum extent feasible have freedom to choose the mode of travel most convenient to his needs * * *. * * *"

The only complicated issue in this case is the third part of the *Data Processing* test, namely, whether Congress intended to preclude standing for this plaintiff. It is important to emphasize that we do not begin our analysis of this issue from a neutral posture, but rather from a strong presumption in favor of judicial review. Where there is no express denial of judicial review, the issue is whether "nonreviewability can fairly be inferred," *Barlow* v. *Collins, supra,* 397 U.S. at 166, and, as Mr. Justice Douglas emphasized, preclusion of judicial review "is not lightly to be inferred." *Ibid.* Judicial review "is the rule, and nonreviewability an exception which must be demonstrated." *Ibid.* It is " 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent' that the courts should restrict access to judicial review." *Id.* at 167, *quoting Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 141 (1967). It is with this strong presumption in mind that we now turn to analyze whether we can infer congressional intent to preclude judicial review from either (1) the language of the Act itself, (2) the legislative history, or (3) the Act's purpose.

1. *Implications to be drawn from the statute itself.*

Section 307 of the Amtrak Act, 45 U.S.C. § 547, provides:

"(a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilites under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

"(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter."

Appellees contend that under the well established maxim of statutory construction *expressio unius est exclusio alterius* the statute's express provision of standing for the Attorney General, employees and employee representatives must be read as an implied exclusion of standing for other parties. We think too much is made of the maxim in this case. Whatever superficial appeal the maxim may have, courts have often noted that it must be applied with a certain degree of caution. It is only an aid to statutory construction, not a rigid rule of law. *Neuberger* v. *C.I.R.*, 311 U.S. 83, 88 (1940); *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 1 Cir., 312 F.2d 214, 220 (1963), *affirmed*, 377 U.S. 235 (1964); *Renken* v. *Harvey Aluminum (Incorporated)*, D. Ore., 226 F.Supp. 169, 175 (1963). The Supreme Court has recognized that rules of statutory construction such as this

"come down to us from sources that were hostile to-

> ward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."

S.E.C. v. *Joiner Corp.*, 320 U.S. 344, 350-351 (1943) (footnotes omitted). *See also Springer* v. *Philippine Islands*, 277 U.S. 189, 207 (1928); *F.T.C.* v. *Standard Motor Products, Inc.*, 2 Cir., 371 F.2d 613, 617-618 (1967); *Hunt Foods & Industries, Inc.* v. *F.T.C.*, 9 Cir., 286 F.2d 803, 807 (1960), *cert. denied*, 365 U.S. 877 (1961); *Matheson* v. *Armbrust*, 9 Cir., 284 F.2d 670, 674 (1960), *cert. denied*, 365 U.S. 810 (1961). Another court has noted:

> "• • • The doctrine *expressio unius est exclusio alterius* is at best an unreliable basis for ascertaining intention. Its premise is that the draftsman has made a comprehensive review of all possible related provisions, from which the inference is to be drawn that his silence indicates a discriminating judgment of rejection. Such a conclusion usually is unrealistic, for it assumes too much foresight in the draftsman. • • •"

Durnin v. *Allentown Federal Savings & Loan Assn*, E.D. Pa., 218 F.Supp. 716, 719 (1963). *See also* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 290-291 (1963).

It seems reasonable to us that the express provision of standing for the Attorney General was not an attempt to *bar* other injured and aggrieved parties from bringing suit, but rather an attempt to *authorize* the Attorney General to bring suit to enforce what otherwise might be viewed as private rights. *See Wood* v. *National Railroad Passenger Corp.*, D. Conn., 341 F.Supp 908, 912 (1972). *Cf. Allen* v.

State Board of Elections, 393 U.S. 544, 555 n.18 (1969). The very brief explanation of Section 307 in the section-by-section analysis of the House Report comports with this view. "Section 307 authorizes the Attorney General of the United States to sue the corporation or any railroad to prevent acts of omission or commission in violation of this legislation." H.R. Rep. No. 91-1580, 91st Cong., 2d Sess., at 9 (1970).

That Congress intended to authorize suits by the Attorney General, and not to bar suits by other parties, is also evident in the scope of authority granted to the Attorney General. He is not simply given power to seek injunctions against violations of the Act, but is authorized to bring suit against Amtrak or any railroad for any actions that obstruct, interfere with, or are inconsistent with the policies of the Act. He is not only authorized to remedy ongoing violations, but any threatened violation, interference, refusal, failure or neglect. By singling out the Attorney General, Congress did not attempt to provide the sole means for litigating violations of the Act, but merely emphasized, even to the point of redundancy, that the Attorney General had broad powers to seek equitable relief under the Act. It was quite understandable for Congress to want to make this clear. The proposal to set up a quasi-public corporation to operate the railroads was, in the words of Senator Prouty, the proposal's draftsman, "a departure from the traditional ways of assisting vital segments of our national transportation system."[4] It was, in the words of other members of Congress, "novel," "ingenious," "imaginative," and "innovative."[5] Given the novelty of the proposal, Congress undoubtedly felt that it could neither foresee nor spell out all the kinds of actions by Amtrak or the railroads that might be inconsistent with the Act's policies. Congress

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[4] S. Rep. No. 91-765, 91st Cong., 2d Sess., at 77 (1970).

[5] 116 CONG. REC. (Part 27) 36597, 36598, 36895 (1970).

therefore want to make it clear that the judiciary, at the behest of the Attorney General, had power to read between the lines of the statute and to enjoin actions or threatened actions which, though not necessarily violations of any express provision of the Act, interfered with the Act's purpose of revitalizing intercity rail passenger service. There is no reason to read into this congressional emphasis an implied purpose to bar other parties from litigating ongoing violations of express provisions of the Amtrak Act.

We might also note that were we to adopt appellees' interpretation of the statute Amtrak and the railroads would be unable to sue each other for violation of their mutual obligations under the Act. For example, should a railroad ignore its obligation to compensate Amtrak under Section 401(a)(2) of the Act, 45 U.S.C. § 561(a)(2), Amtrak would be unable to go into court and sue for the money owed since such a suit would be for a failure to discharge a responsibility under the Act and thus within the scope of Section 307. It is hard to believe that, having given Amtrak a broad mandate to revitalize the nation's intercity rail service, the Congress would have hampered it in this fashion. Amtrak is by statute a for-profit corporation, *see* 45 U.S.C. § 541, and we presume Congress intended it to have those powers vital to a profit-making enterprise, including the power to bring suit against those with whom it contracts. We hesitate to interpret Section 307 in a manner which would deny it that power.

Turning to the reference in Section 307 to suits by employees and their representatives, appellees argue that to allow any injured and aggrieved party to sue for violations of the Act would turn this provision into mere surplusage and that such an interpretation should be avoided. *See, e.g., McDonald* v. *Thompson,* 305 U.S. 263, 266 (1938); *D. Ginsberg & Sons, Inc.* v. *Popkin,* 285 U.S. 204, 208 (1932). We reject this reasoning on two grounds. First, like the Attorney General, employees and their representatives are

not only empowered to litigate actual violations of the Act; they can bring suit against any actual or threatened "action, practice, or policy inconsistent with the policies and purposes" of the Act. To permit other parties to seek injunctions against actual violations of express provisions of the Act does not turn this language into surplusage, for labor's authority to sue is much broader. Second, it is reasonable to assume that Congress wanted to take special precautions to make it clear that employees and their representatives had standing under the Act. Because the primary purpose of the Act was to improve intercity rail passenger service for the benefit of passengers, Congress might well have feared that under the *Data Processing* standing test employees and their representatives would not have been considered members of the class intended to be protected by the legislation, at least not in all cases in which their interests were affected. *See Data Processing Service* v. *Camp, supra,* 397 U.S. at 154-156; *Barlow* v. *Collins, supra,* 397 U.S. at 164-165. That Congress merely intended to emphasize the rights of labor is evident from other provisions of the Act. For example, Section 405(a), 45 U.S.C. § 565(a), requires railroads to make "fair and equitable arrangements to protect the interests of employees affected by discontinuances of intercity rail passenger service • • •" and other subsections define the substantive content of such arrangements. Despite the clarity of this requirement, Section 401 (a) of the Act, 45 U.S.C. § 561(a), again emphasizes that a valid contract under the Act must include protective arrangements for employees. We are therefore confident that, by singling out employees and their representatives in Section 307, Congress was not attempting to prevent other parties from bringing suit, but was simply making it abundantly clear that labor's interests would be protected as well.

Since we can explain the express provision of standing in the Attorney General, employees and employee repre-

sentatives on grounds unrelated to any congressional intent to preclude other injured and aggrieved parties from bringing suit, we cannot reasonably infer from the statutory language an intent to bar other parties from bringing suit, especially in light of the strong presumption in favor of review with which we began our analysis.

2. *Implications to be drawn from the legislative history.*

As originally drafted, Section 307 provided jurisdiction "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any individual affected thereby * * *." S. 3706, 91st Cong., 2d Sess., § 307(a) (May 7, 1970), reprinted in Supplemental Hearings, *supra* note 3, at 44. The National Legislative Director of the United Transportation Union presented the Subcommittee with an amendment that would have deleted the phrase "in a case involving a labor agreement, upon petition of any individual affected thereby" and would have substituted the phrase "of any person adversely affected or aggrieved thereby, including the representatives of the employees of any railroad or of the Corporation."[6] He claimed that the amendment was designed "[t]o provide a legal remedy to any aggrieved person including the duly authorized representatives of the employees of the railroads and of the Corporation for any violations of the Act by the Corporation or by any railroad."[7] Following this testimony, the General Counsel of the Railway Labor Executives Association appeared before the Subcommittee and introduced a similar amendment. He stated:

> "The third substantive amendment we propose would modify the language of section 307(a) on pages 14 and 15 of the bill so as to provide that any aggrieved party, including employee representatives, could institute legal proceedings for violations of the law.

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[6] Supplemental Hearings, *supra* note 3, at 122.

[7] *Ibid.*

> "As the bill now reads, only the Attorney General, except in cases involving a labor agreement, could bring such actions . . . ."[8]

Later, Secretary of Transportation Volpe offered some comments on the proposed amendments. His letter to the Committee stated:

> "Labor proposes that subsection (a) of section 307 be amended to make sanctions available not only against the Corporation but against all railroads. It also proposes that any person adversely affected or grieved [*sic*], including employee representatives, be permitted to seek relief.
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> "Sanctions are normally imposed by the Government. Consequently, I would be opposed to permitting 'any person' to seek enforcement of section 307. I would have no objection, however, if the section were revised to permit employee representatives, as well as employees adversely affected, to seek equitable relief."[9]

As is evident from the language of Section 307 as enacted, the Committee never adopted the proposed amendment. Rather it changed the phrase "in a case involving a labor agreement, upon petition of any individual aggrieved thereby" to read "in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives."

Appellees suggest that the Committee's refusal to adopt the proposed amendment indicates Congress' intent not to allow any person aggrieved to have standing to sue. While the argument has a superficial appeal, we are constrained to reject its implications. Interpretation of statutes cannot safely rest upon changes made in congressional committee without explanation. *Trailmobile Co.* v. *Whirls*, 331 U.S.

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[8] *Id.* at 134.

[9] *Id.* at 85.

40 (1947). Courts should avoid delving into "legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945). Especially is this true when a court is asked to draw inferences from congressional failure to adopt proposed amendments to legislation. "Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment • • • including the inference that the existing legislation already incorporated the offered change." *United States* v. *Wise*, 370 U.S. 405, 411 (1962).

In the instant case we are unable to draw inferences from the legislative history with any confidence. The proposed amendment was never debated or criticized by members of Congress so that failure to adopt the amendment might reasonably be construed to be congressional rejection of that which the amendment provided for. *Compare National Automatic Laundry & Cleaning Council* v. *Shultz*, 143 U.S. App.D.C. 274, 291, 443 F.2d 689, 706 (1971). The Committee might well have believed, notwithstanding the remarks of railway labor representatives, that Section 307 as originally drafted did not bar suits by all injured and aggrieved parties.[10] Indeed, the only mention of the scope

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[10] It is also conceivable that the Committee rejected labor's proposed amendment because it may have constituted an unconstitutional expansion of federal jurisdiction. As quoted in text, the amendment would have permitted any person "adversely affected *or* aggrieved" to bring suit. (Emphasis added.) Since the provision was worded in the alternative, it may reasonably have been read to allow persons who are aggrieved but not injured to bring suit. The Supreme Court had indicated, prior to passage of the Amtrak Act, that the "case" or "controversy" requirement of Article III required that the plaintiff himself be injured in fact. *See, e.g., Data Processing Service* v. *Camp*, 397 U.S. 150, 152 (1970). There

of Section 307 during debate on the floor of Congress suggests that Congress interpreted the section to permit such suits. When the Senate considered the Amtrak Act, it had before it both the proposal by Senators Hartke and Prouty (the one eventually enacted into law) and a competing proposal put forth by Senators Pell and Kennedy. In support of his proposal, Senator Kennedy introduced into the Congressional Record a chart summarizing the basic differences between the two proposals. Looking at the item on the chart called "Sanctions," we find this simple notation to describe both proposals: "In Federal District Court by affected parties for violations of Act." 116 CONG. REC. (Part 11) 14275 (1970). At least one member of Congress, therefore, thought the Act, as reported from committee, did allow suits by "affected parties." And there is no indication that any member of Congress thought otherwise.

Nor do we find it significant that labor representatives testifying at the comittee hearings said that the Act, as originally drafted, barred all parties other than the Attorney General and employees from bringing suit. The

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was substantial scholarly debate as to whether the Court's standing tests were in fact constitutionally required. *See, e.g.*, Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L. J. 816 (1969).

If injury in fact was required by Article III's case or controversy requirement, then settled principles of law, dating back to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), indicated that Congress had no power to expand the jurisdiction of federal courts beyond the scope of Article III to cases in which the plaintiff was not injured in fact. Congress might well have believed, therefore, that the proposed amendment was unconstitutional.

It was not until after enactment of the Amtrak Act that the Supreme Court, in a footnote seemingly inconsistent with recent pronouncements such as *Data Processing*, said that "where a dispute is otherwise justiciable" the question of

individual opinions of witnesses at hearings are of dubious value in interpretation of legislation. *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931); *Pacific Ins. Co.* v. *United States*, 9 Cir., 188 F.2d 571, 572, *cert dismissed*, 342 U.S. 857 (1951); *United States* v. *Kung Chen Fur Corp.*, Ct. Cus. & Pat. App., 188 F.2d 577, 584 (1951); *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 80 U.S.App.D.C. 119, 122, 149 F.2d 507, 510 (1945), *affirmed*, 326 U.S. 446 (1946).

Finally, the Act itself indicates that where Congress intended to preclude judicial review it knew very well how to make its wishes clear. Section 201, 45 U.S.C. § 521, provides that the Secretary of Transportation is to designate a "basic system" of points between which intercity passenger trains shall be operated, and Section 401(b) of the Act, 45 U.S.C. § 561(b), requires Amtrak to operate trains within the basic system unless such trains are being operated by carriers not contracting with Amtrak or by regional transportation agencies. Section 202 of the Act, 45 U.S.C. § 522, expressly provides with respect to review of the Secretary's determination of the basic system: "The basic system as designated by the Secretary shall become effective for the purposes of this chapter upon the date that the final report of the Secretary is submitted to Congress *and shall not be reviewable in any court.*" (Emphasis added.) Congress could just as easily have made clear its desire to limit the right to seek review to the Attorney General and labor by placing the word "only" before the phrase "upon petition of the Attorney General • • •" in the statute. *Compare Wood* v. *National Railroad Passenger Corp., supra*, 341 F.Supp. at 911, *with Congress of Railway Unions* v. *Hodgson*, D. D.C., 326 F.Supp. 68, 78

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standing "is one within the power of Congress to determine." *Sierra Club* v. *Morton, supra* note 2, 405 U.S. at 732 n.3.

(1971). That it failed to do so indicates to us that it had no intent to bar other parties from seeking judicial review.

3. *Implications to be drawn from the purposes of the Amtrak Act.*

A command of a statute to preclude judicial review may sometimes be inferred from its purpose. *Barlow* v. *Collins, supra,* 397 U.S. at 167. *See also Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943). It is argued that to allow all injured and aggrieved parties to sue for violations of the Amtrak Act will subject the railroads and Amtrak to crippling litigation, involving massive expenses and distractions, which may well prevent them from devoting adequate time, money and attention to the task for which Congress brought Amtrak into being, namely, saving the country's intercity rail passenger service.

Although such arguments as these normally carry little weight, they merit some discussion here. The legislative history makes it quite clear that one of Congress' purposes in enacting the Amtrak Act was to enable railroads to discontinue uneconomical trains that were draining their resources. The House Report recognized:

> "In order to achieve economic viability in a basic rail passenger system, the Secretary [of Transportation] stated that there will have to be a 'paring of uneconomic routes'. • • •
>
> "In other words, a rational reduction of present service will be required to save *any* passenger service. • • •" [11]

The legislative history also indicates that one of the faults of the system prior to passage of the Amtrak Act was that uneconomical trains could not be discontinued until after lengthy administrative hearings before the ICC and appeals before three-judge District Courts from ICC rul-

[11] H.R. Rep. No. 91-1580, 91st Cong., 2d Sess., at 3 (1970). (Emphasis in original.)

ings.[12] The Amtrak Act dealt with this problem by providing that railroads entering into a contract could immediately terminate all of their intercity rail passenger service. *See* 45 U.S.C. § 561(a)(1).

But we are unable to conclude from this legislative purpose that Congress intended to deny standing to injured and aggrieved passengers. It must not be forgotten that the chief purpose of the Amtrak Act was to save the passenger train from extinction. "The basic purpose of this bill is to prevent the complete abandonment of intercity rail passenger service * * *." H.R. Rep. No. 91-1580, *supra*, at 1. Congress intended to ensure survival of the passenger train by enacting an elaborate regulatory system which would encourage railroads to turn over all their intercity passenger service to Amtrak. It was hoped that Amtrak would then "revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking, particularly with new equipment or advanced vehicles." *Id.* at 1-2.

Achievement of Congress' objectives plainly requires compliance with the provisions of the Amtrak Act, and judicial review of Amtrak's actions is necessary if compli-

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[12] Hearings on H.R. 12084 etc., Before Subcomittee on Transportation & Aeronautics, House Committee on Interstate & Foreign Commerce, 91st Cong., 1st Sess., at 307 (1969). *See, e.g., Chicago & Eastern Ill. R. Co. Discontinuance of Trains*, 331 I.C.C. 447 (1968), *appeal dismissed, sub nom. City of Chicago* v. *United States*, N.D. Ill., 294 F.Supp. 1103, *reversed & remanded to District Court*, 396 U.S. 162 (1969), *vacated & remanded to ICC*, N.D. Ill., 312 F.Supp. 442, *reversed & remanded to District Court*, 400 U.S. 8 (1970); *Chicago & Eastern Ill. R. Co. Discontinuance of Trains*, 333 I.C.C. 626 (1968), *reversed & remanded*, N.D. Ill., 308 F.Supp. 645 (1969), *prob. jurisdiction noted*, 398 U.S. 957 (1970), *judgment vacated & case remanded to District Court with directions to remand to ICC*, 400 U.S. 987 (1971).

ance is to be assured. Allowing parties other than the Attorney General and labor to contest violations of the Act is not only fully consistent with, but is also necessary to achieve, this objective.[13] As the Supreme Court noted on another occasion when it was confronted with a statute that provided for review at the behest of the Attorney General without expressly providing for or barring review by other parties:

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. * * * The Attorney General has a limited staff and often might be unable to uncover quickly [violations of the Act]. * * *"

The guarantees of the legislation

> "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement * * *"

Allen v. *State Board of Elections, supra,* 393 U.S. at 556-

[13] It is important to note that, even though allowing suits by parties other than the Attorney General and employees will doubtless result in increased litigation, such litigation will not burden the railroads as much as litigation under pre-Amtrak procedure. The major problem with pre-Amtrak procedure was not the presence of litigation, but the fact that litigation involved, in the case of the ICC, determining the nebulous question of whether the service "is required by public convenience and necessity and will not unduly burden interstate or foreign commerce * * *." 49 U.S.C. § 13a(1) (1970). Resolution of this issue required numerous public hearings at various sites along a given train's route and analysis of complex corporate financial records. It is doubtful that issues arising under the Amtrak Act will involve resolution of such difficult factual issues or will entail the same amount of time such fact-finding consumes. For example, in the present case the facts are undisputed and the sole question is the legal issue of whether the Act permits Amtrak to contract with a subsidiary without contracting with its parent.

557. (Footnotes omitted.) The Attorney General's action in the case which is a companion on appeal to the instant case supports the Court's observations. After the District Court's decision to deny review for lack of standing, a member of Congress sent a letter to the Attorney General asking that he enter the litigation to remove procedural obstacles to adjudication on the merits. In refusing to do so, the Attorney General expressed the belief that he had no power under the Amtrak Act "to sue for a construction of the Act or to enjoin a purely technical violation." He maintained that his only authority was to bring suits "to protect and enhance the legislative purpose."[14] Indeed, appellees in this case have been unable to refer us to a single instance in which the Attorney General has either institgated or participated in litigation under the Amtrak Act, except for a few cases brought by other parties in which he intervened solely to support the defense that parties other than labor and the Attorney General did not have standing to sue. *Cf. Allen v. State Board of Elections, supra,* 393 U.S. at 556 n.22. To rely on the Attorney General as the sole source of litigation under the Act, as he would be in cases where labor's interests were not adversely affected, is thus to rest enforcement of the entire regulatory scheme on the Attorney General's virtually unreviewable[15] distinction between a mere "technical" violation and one that seriously interferes with the legislative purpose.

Absent some express and definite indication that it intended such a result, we find it difficult to believe that Congress would have hung a program as important as this by

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[14] Letter from Assistant Attorney General L. Patrick Gray, III to Congressman John Slack, Nov. 19, 1971, in appellant's Reply to Supplemental Memorandum.

[15] *See Powell* v. *Katzenbach,* 123 U.S.App.D.C. 250, 359 F.2d 234 (1965), *cert. denied,* 384 U.S. 906 (1966).

such a thin thread. We think such a result is neither compelled by the language of the statute, reasonably to be implied from the legislative history, nor conducive to achievement of the Act's laudable purpose of revitalizing the nation's intercity rail passenger trains. We therefore hold that parties other than the Attorney General, employees and employee representatives who are injured and aggrieved by actions of Amtrak or railroads in violation of the Amtrak Act have standing under that Act to seek injunctions against such actions in federal court.

III

Amtrak suggests that the real issue in this case is not standing, but rather the jurisdiction of the District Court. Focusing on the jurisdictional nature of Section 307, Amtrak argues that by expressly giving the District Court jurisdiction in cases brought by the Attorney General, employees or their representatives Congress intended to deprive the District Court of jurisdiction over suits brought by all other parties. But even were we to accept Amtrak's characterization of the issue presented, we would be unable to agree with its conclusion.

Jurisdiction of the District Court need not rest on Section 307. Appellant's complaint alleged jurisdiction on the basis of 28 U.S.C. § 1337 (1970) which provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Appellees' answer to Section 1337 jurisdiction is the Supreme Court's decision in *Switchmen's Union* v. *National Mediation Board, supra.* In that case the Supreme Court held that the general grant of jurisdiction in Section 1337 could not be invoked to sustain jurisdiction to review decisions of the National Mediation Board certifying a representative for collective bargaining, even though such a case admittedly seemed to

meet the requirements of Section 1337. *Switchmen's Union* is cited in the Court's opinion in *Barlow* v. *Collins, supra,* as authority for the proposition that "[a] clear command of the statute will preclude [judicial] review; and such a command of the statute may be inferred from its purpose." 397 U.S. at 167.

We think *Switchmen's Union* is obviously distinguishable from our case on several significant grounds. First, the Court admitted in that case that "[i]f the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 320 U.S. at 300. It found that the right of collective bargaining involved in that case was being protected without judicial review since the Mediation Board was determining the appropriate craft or class in which an election should be held. In other words, in that case the Mediation Board was already acting as a neutral body resolving disputes between labor and management or between competing labor groups. In sharp contrast, in our case no neutral administrative body had resolved a dispute between the antagonists—Amtrak and the railroads on the one hand and railroad passengers on the other. Amtrak has simply made a determination about the meaning of its own enabling statute. In this situation we are unable to conclude, as the Supreme Court concluded in *Switchmen's Union,* that there is considerable question as to whether judicial review would strengthen the rights protected by the legislation. *Id.* at 301.

It is also important to note that the finding of a command of the statute to preclude judicial review in *Switchmen's Union* was based on the entire history of Congress' treatment of railway labor problems. As the Court emphasized, Congress intentionally left large areas of the field

"in the realm of conciliation, mediation, and arbitration." *Id.* at 302. To create a new judicially enforceable right in this kind of situation would have been contrary to this long history. In our case, on the other hand, the history of railroad discontinuances indicates that until now administrative and judicial remedies were available at the behest of passengers. As is discussed more fully in our opinion in No. 71-1321, *infra*, prior to passage of the Amtrak Act railroads had to seek approval of their train discontinuances before either the state regulatory commissions or the ICC. Passenger groups and other affected parties were allowed to intervene and argue their cases in these forums.[16] We cannot help but believe that if Congress had wanted to take away these rights it would have done so in a more explicit fashion. Thus for the same reasons that we found no congressional intent in Section 307 to overcome the strong presumption of standing in favor of persons intended to be protected by legislation, we now find no congressional intent to overcome the general jurisdictional grant in Section 1337.

Appellees' final challenge to Section 1337 jurisdiction is to note that Section 1337 merely permits jurisdiction; it does not create a cause of action. *See Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951). The question then becomes, can a private right of action be implied under the Amtrak Act? We think there is ample precedent for implying such a private cause of action. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood, supra*, 327 U.S. at 684. When Congress seeks to protect a group such as railroad passengers, we may reasonably imply, absent express and definite indications to the contrary, that Congress intended

[16] *See* 49 C.F.R. § 1122.4(d) (Oct. 1, 1972).

this group to have judicial relief to achieve the protection Congress intended. *See J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431-432 (1964). It is argued that the principle should not apply because railroad passengers are merely indirect beneficiaries of the Amtrak Act. We most heartily disagree. As indicated earlier, the congressional statement of purpose makes clear that the main function of the Amtrak Act was to preserve and improve train service. The object of the legislation was not just trains, but the people who ride them.

The private civil action, involving injured individuals acting as private Attorneys General, is becoming an accepted method of policy enforcement. *See Gomez* v. *Florida State Employment Service*, 5 Cir., 417 F.2d 569 (1969). *See also* Note, *Implying Civil Remedies From Federal Regulatory Statutes, supra.* Not only is it an accepted method, but it is one that the courts have an interest in encouraging. The judicial process works best when those with "a direct stake in the outcome" participate. *Sierra Club* v. *Morton, supra*, 405 U.S. at 740. It is important that cases be brought by those with "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues * * *." *Baker* v. *Carr, supra*, 369 U.S. at 204. Courts have supported these policies by recognizing private rights of action in a wide variety of situations and refusing to recognize those actions only in those cases where such was the express intent of Congress, *see, e.g., Powell* v. *Washington Post Co.*, 105 U.S.App.D.C. 374, 267 F.2d 651, *cert. denied*, 360 U.S. 930 (1959), or where private actions are inconsistent with other important policies such as exhaustion of administrative remedies, *see, e.g., Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra; B. F. Goodrich Co.* v. *Northwest Industries, Inc.*, 3 Cir., 424 F.2d 1349, *cert. denied*, 400 U.S. 822 (1970). Neither of these factors is present in the case of the Amtrak Act. We there-

fore conclude that a complaint alleging a violation of the Amtrak Act states a cause of action arising under an Act of Congress regulating commerce and thus may be litigated in federal district court under Section 1337.

Reversed and remanded.

No. 72-1321

On April 1, 1971, appellee Baltimore & Ohio Railroad Company (B & O) filed a notice with the ICC stating that it would discontinue six of its trains effective May 1, 1971. Four of the trains operate between the District of Columbia and Cumberland, Maryland. The other two operate between the District and Baltimore. The notice was filed pursuant to Section 401(a)(1) of the Amtrak Act, 45 U.S.C. § 561(a)(1). That section provides that a railroad which has entered into a contract with Amtrak "shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service • • •" provided that the railroad give notice of the discontinuance. Appellant Potomac Passengers Association, a group of rail commuters in the Washington, D.C. area, brought this action to obtain a declaration that the trains provided "commuter" rather than "intercity" service and are thus exempt from discontinuance under the Amtrak Act. In addition, appellant sought an injunction against the discontinuances on the ground that they violated the Amtrak Act. The District Court, accepting without comment appellant's characterization of the lawsuit as one for a violation of the Amtrak Act, held that appellant did not have standing to sue under Section 307 of the Act and dismissed the complaint. *See Congress of Railway Unions* v. *Hodgson, supra,* 326 F.Supp. at 79-80.

Were we to accept this characterization of the lawsuit, the case would present the same issue as that in No. 72-1546, *supra,* and we would reverse and remand for a hear-

ing on the merits for the same reasons as control that case. It now appears, however, that this characterization is improper. While this lawsuit admittedly seeks a judicial interpretation of a provision of the Amtrak Act, it cannot properly be characterized as a suit for a violation of the Amtrak Act, and it is therefore not controlled by the standing requirement of Section 307. Instead this suit, properly understood, seeks a declaratory judgment that the trains discontinued by B & O provide "commuter" service and are therefore outside the coverage of the Amtrak Act—that is, that their discontinuance is neither authorized nor barred by the Act but is subject to the pre-existing jurisdiction of state regulatory agencies and the ICC. We hold that the District Court has jurisdiction to hear the merits of this declaratory judgment action and therefore reverse and remand.

To understand the posture of this case, it is helpful to summarize briefly the history of the law governing passenger train discontinuances. Prior to 1958 discontinuances of all passenger trains, without distinction as to whether they provided intercity or commuter service, required the approval of the appropriate regulatory agency in each of the states in which the train operated. *See United States* v. *City of Chicago*, 400 U.S. 8, 11 n.3 (1970). This procedure had many faults which Congress attempted to cure by enacting Section 13a of the Interstate Commerce Act, 49 U.S.C. § 13a. This section gave the ICC the power to approve train discontinuances, again without distinction as to the kind of service—intercity or commuter—provided. The ICC's jurisdiction was not exclusive, however. If a railroad so desired, it could continue to seek authorization for a discontinuance from the appropriate state regulatory agencies. At its option, or after the state commission refused to approve the discontinuance, a railroad seeking to discontinue an interstate train could bypass the state regulatory agencies by filing a notice of proposed discon-

tinuance with the ICC. Unless ordered by the Commission to continue the service in question, the railroad could, 30 days after filing its notice, discontinue the service notwithstanding the laws or constitution of any state or the decision or order of, or pendency of any proceeding before, any court or state authority to the contrary. That is, the jurisdiction of the state agencies was exclusive until a notice of discontinuance was filed with the ICC.[17] Once such a notice was filed, the ICC had exclusive jurisdiction.[18]

The Amtrak Act in no way affected this procedure as it applies to passenger trains providing commuter service. The Act applies solely to "intercity rail passenger service," defined in the Act as "all rail passenger service other than (A) commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations * * *." 45 U.S.C. § 502 (5). Without going into the more complicated aspects of the Act, it basically permits railroads that have signed contracts with Amtrak to discontinue their intercity rail passenger service, and it bars railroads that have not

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[17] *See generally Kennedy* v. *Baltimore & Ohio R. Co.*, 342 I.C.C. 19, 21 (1972): "It is well settled that section 13a(1) is a permissive section of the act and does not impose any requirement upon a carrier to file a notice of proposed discontinuance. The first sentence of the statute states that a carrier '*may*, but *shall not be required to*, file with the Commission * * *.' [Emphasis supplied.] If a carrier does not choose to file with the Commission, jurisdiction is retained by the States."

[18] *See Pennsylvania R. Co.* v. *Sharfsin*, M.D. Pa., 240 F. Supp. 233, 235, *vacated & remanded on other grounds, sub nom. Pennsylvania Public Utility Comm'n* v. *Pennsylvania R. Co.*, 382 U.S. 281 (1965), *affirmed*, 3 Cir., 369 F.2d 276 (1966), *cert. denied*, 386 U.S. 982 (1967); *Chicago & Eastern Ill. R. Co.* v. *United States*, *supra* note 12, 308 F.Supp. at 648.

signed contracts with Amtrak from discontinuing such service prior to 1975. All references in the Act are to *intercity* rail passenger service;[19] the Act neither authorizes nor bars discontinuance of trains providing commuter and other short-haul service. It simply has no effect on such trains. This is evident not only from the language of the Act but also from the legislative history.[20] Therefore, a railroad desiring to discontinue a train providing commuter and other short-haul service must seek approval from either the regulatory agencies of the states through which the train passes or from the ICC, just as it did prior to passage of the Amtrak Act.[21]

B & O has not sought such approval in this instance because it believes that the trains it discontinued provide in-

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[19] A prior version of the bill referred in one section simply to "passenger service." The mistake was quickly brought to the attention of the Committee and the words "intercity rail" inserted before "passenger service" "to avoid the application of this section to commuter service." Supplemental Hearings, *supra* note 3, at 110.

[20] "The bill will apply only to intercity passenger trains and would not apply to service which is primarily commuter service." 116 CONG REC. (Part 11) 14164 (1970). "[T]his legislation * * * refers to intercity transportation of passengers by rail. It does not include commuter service. Of relevance here is the fact that the Senate has approved a bill specifically allocating $3 billion for commuter and other urban transportation. * * * Basically, commuter service is excluded from the bill * * *." *Id.* at 14178. *See also* note 19 *supra*.

[21] The ICC has recognized its continued jurisdiction over commuter trains if a railroad invokes that jurisdiction by filing a notice of discontinuance with the Commision. *See Chicago S. Shore & S. Bend R. Restructuring of Pass. Serv.*, 342 I.C.C. 154, 179-180 (1972). *See also Penn Central Transp. Co. Discontin. or Change in Serv.*, 338 I.C.C. 318, 320 (1971). *Cf. Kennedy* v. *Baltimore & Ohio R. Co.*, *supra* note 17, 342 *I.C.C.* at 21.

tercity rail passenger service, not commuter and other short-haul service. It therefore believes that the discontinuances were authorized under the Amtrak Act. Potomac Passengers Association has requested both a declaration that these trains provide "commuter and other short-haul service" and an injunction against the discontinuances. The issue, then, is whether the District Court has jurisdiction and power to grant either remedy.

At the outset, it is evident that Section 307 of the Amtrak Act does not affect the result. That section, by its own terms, applies only to suits seeking equitable relief necessary to prevent or terminate (1) violations of the Act, (2) conduct that is inconsistent with the policies and purposes of the Act or obstructs or interferes with activities authorized by the Act, (3) failures to exercise responsibilities imposed by the Act, and (4) threats of such actions. Discontinuance of a commuter train, however, is not a violation of the Act, is not inconsistent with the policies of the Act, and does not interfere with activities authorized by the Act. The Act has nothing to do with commuter trains. If the trains at issue provide intercity rail passenger service, as B & O contends, there is no question but that their discontinuance is lawful under the Act.[22] If the trains provide commuter and other short-haul service, as appellant alleges, there is no question but that their discontinuance is unlawful—not under the Amtrak Act, but under the laws of the states through which they pass, since approval has admittedly not been sought from either the state regulatory

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[22] The complaint also alleged that the discontinuances were illegal because the discontinuance notices were posted prior to the signing of the contract with Amtrak, even though the discontinuances did not go into effect until after the signing of the contract. Appellant has not pursued this issue on appeal. If the issue is pursued further, of course, nothing we say here should be read as a reflection of our views on the merits of that issue.

agencies or the ICC.[23] Section 307, therefore, has nothing to do with this case, as is evident from subsection (b):

> "Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter."

The foregoing discussion also indicates that the District Court has no power to enjoin discontinuance of these trains. If they provide intercity rail passenger service, their discontinuance is concededly lawful. If they provide commuter service, since no notice of discontinuance has yet invoked the jurisdiction of the ICC, their discontinuance is a violation of state, not federal, law.[24] The District Court has no power to issue an injunction enforcing state law in this instance, for to do so would usurp the primary jurisdiction of the state regulatory agencies and would circumvent the procedure established by the state to enforce its own laws.[25] Should B & O seek approval of the

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[23] "The [Public Service] Commission [of the State of Maryland] may require the continuance of any service rendered to the public by any public service company under any franchise, right, or permit, after its expiration date, if any; and no service under a franchise, right or permit shall be discontinued or abandoned without the consent of the Commission, which shall be granted if the Commission finds that the present or future public convenience and necessity permits such discontinuance or abandonment." 7 ANN. CODE OF MD. Art. 78, § 72 (1969).

"No railroad or other public utility shall discontinue any regular passenger train, or other public service facility, or change any regular passenger train schedule or timetable, without first obtaining authority from the [Public Service Commission of the State of West Virginia] so to do * * *." 9 W. VA. CODE ANN. § 24-3-1 (1971).

[24] *See Kennedy* v. *Baltimore & Ohio R. Co.*, *supra* note 17. *See also* note 1 *supra*.

[25] *See, e.g.*, 7 ANN. CODE OF MD. Art. 78, § 99 (1969): "When

discontinuances from the ICC, an injunction would be inconsistent with the ICC's primary jurisdiction.[26]

It is equally clear, however, that the District Court has jurisdiction to render a declaratory judgment as to whether these trains provide intercity rail passenger service or commuter and other short-haul service within the meaning of the statute. That is, the court may decide whether discontinuance of these trains is still subject to the jurisdic-

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the [Public Service] Commission [of the State of Maryland] is of the opinion that any public service company subject to its jurisdiction is violating or is about to violate any of the provisions of this article, it shall cause action to be brought in its name for mandamus or injunction * * *."

[26] Once a notice of discontinuance is filed with the ICC, that agency can exercise administrative discretion and expertise in several ways. First, the ICC has the option of investigating the discontinuance or simply letting the discontinuance take effect. *See City of Chicago* v. *United States*, *supra* note 12, 396 U.S. at 165. Even if the ICC does enter into an investigation, the decision whether or not to enjoin the discontinuance pending the outcome of the investigation is also within the discretion of the ICC. "Upon the institution of such investigation, the Commission * * * *may* require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective." 49 U.S.C. § 13a(1). (Emphasis added.) Finally, of course, the ICC uses its expertise in deciding whether to approve the discontinuance or whether continued operation of the train "is required by public convenience and necessity and will not unduly burden interstate or foreign commerce * * *." *Ibid.*

Where matters such as these are entrusted by statute to an administrative agency, the doctrine of primary jurisdiction requires that the parties not circumvent the agency by means of a court action. *See Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). *See also Trans-Pacific Airlines* v. *Hawaiian Airlines*, 9 Cir., 174 F.2d 63 (1949).

tion of the state regulatory agencies and the ICC or whether they are exempted from such jurisdiction by the Amtrak Act. The sole issue in this case is interpretation of a federal law regulating the railroads, and the case is therefore one meeting the jurisdictional requirements of 28 U.S.C. § 1337 which grants jurisdiction of civil actions arising under any Act of Congress regulating commerce. The power to construe the Amtrak Act and declare the nature of these trains is subsumed within the power granted by the Declaratory Judgment Act, 28 U.S.C. § 2201 (1970). We therefore reverse and remand the case to the District Court with instructions to adjudicate the merits of the controversy and issue appropriate declaratory relief.[27]

So ordered.

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[27] In its complaint appellant requested that the District Court refer the intercity-commuter issue to the ICC, a procedure that some other courts have used. *See, e.g., Illinois Commerce Comm'n* v. *Chicago & Eastern Ill. R. Co.*, 400 U.S. 987 (1971); *In re Penn Central Transportation Co.*, E.D. Pa., 329 F.Supp. 572 (1971). *See also In re Penn Central Transportation Co.*, 3 Cir., 457 F.2d 381 (1972). The ICC has already decided several such referral cases. *See, e.g., Penn Central Transp. Co. Discontin. or Change in Serv.*, *supra* note 21; *Penn Central Transp. Co.—Status of Pass. Serv.*, 338 I.C.C. 621 (1971); *same*, 338 I.C.C. 660 (1971); *same*, 338 I.C.C. 690 (1971); *Chicago & Eastern Ill. R. Co. Discontinuance of Trains*, 338 I.C.C. 714 (1971). We intimate no views at the present time as to either the propriety of such a referral in the instant case or the validity of the standards developed by the ICC in the above cited cases.

Filed Jan. 5, 1973

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972
Civil Action 842-71

No. 71-1321

POTOMAC PASSENGERS ASSOCIATION, *Appellant*

v.

CHESAPEAKE AND OHIO RAILROAD COMPANY AND BALTIMORE AND OHIO RAILROAD COMPANY

No. 71-1546

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Appellant*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY AND NATIONAL RAILROAD PASSENGER CORPORATION

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Bazelon, Chief Judge, Wright and Wilkey, Circuit Judges.

Judgment

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On considertion of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby reversed and these cases are hereby remanded to

the District Court for the reasons set forth in the opinion of this Court filed herein this date.

Per Curiam

Dated: January 5, 1973
Opinion by Circuit Judge Wright

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

No. 71-1546

Civil Action 831-71

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Appellant*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY and NATIONAL RAILROAD PASSENGER CORPORATION

Before: Bazelon, Chief Judge, and Wright and Wilkey, Circuit Judges

Order

On consideration of appellees' motion to extend the stay of the mandate to March 22, 1973, it is

ORDERED by the Court that the motion is granted and the Clerk is directed to stay the issuance of this Court's mandate until March 22, 1973.

The stay granted herein shall be subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

NATIONAL RAILROAD PASSENGER CORPORATION,
CENTRAL OF GEORGIA RAILWAY COMPANY,
and SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners National Railroad Passenger Corporation, Central of Georgia Railway Company, and Southern Railway Company respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on January 5, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is printed as Appendix A hereto. The unreported order of the District Court is printed as Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1973. On February 9, 1973 that court stayed the issuance of its mandate for a period of thirty days, and on March 9, 1973 the stay was extended to March 22, 1973.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the Court of Appeals err in reversing the judgment of the District Court and holding that any allegedly injured person may maintain an action in the District Court to enjoin supposed violations of the Rail Passenger Service Act of 1970 (the "Amtrak Act"), despite the provision in Section 307 of the Act that the District Courts shall have jurisdiction to grant such relief "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives"?

STATUTORY PROVISION INVOLVED

Section 307 of the Amtrak Act [45 U.S.C. § 547] provides as follows:

> *Jurisdiction of the District Courts of the United States to Impose Sanctions.*
>
> (a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities

[1] The stay order is printed as Appendix B hereto.

under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter.

STATEMENT OF THE CASE

This is an action to enjoin the discontinuance of certain trains previously operated by the Central of Georgia Railway Company. Central discontinued the trains under authority of the Amtrak Act (the Rail Passenger Service Act of 1970, 45 U.S.C. § 501 et seq.) after entering into a contract with the National Railroad Passenger Corporation (Amtrak) for assumption by Amtrak of Central's intercity rail passenger service responsibilities. Respondent National Association of Railroad Passengers alleges that this contract violates the terms and purposes of the Amtrak Act because the Act permits only contracts which embrace the entire intercity passenger responsibility of a railroad and Amtrak has not contracted with the Southern Railway Company of which Central is allegedly a part.[2] The suit was said to be brought "pursuant to 28 U.S.C. 1331,

[2] Complaint, p. 3.

1337, and 45 U.S.C. 501 et seq., and particularly sections 564(a) and 642 of Title 45."[3]

On May 5, 1971, the District Court for the District of Columbia (Honorable John H. Pratt) dismissed the complaint. Aware that five days earlier Judge Howard F. Corcoran of the same court had issued a detailed opinion concluding that Section 307 of the Amtrak Act barred suit by another passenger association to enjoin certain other train discontinuances,[4] Judge Pratt simply entered a brief order (Appendix C hereto) declaring, *inter alia,* "that the plaintiff does not [have] standing to maintain this action under Section 307 of the Rail Passenger [Service] Act of 1970."

The Court of Appeals reversed and remanded the case to the District Court with instructions to proceed to an adjudication on the merits. In an opinion by Circuit Judge J. Skelly Wright, in which Chief Judge Bazelon and Circuit Judge Wilkey concurred, the court concluded that plaintiff's standing to sue Amtrak and the defendant railroads should be determined by the same three-part standard that governs standing to sue government agencies and that the first two tests of the standard—(1) whether plaintiff has alleged that he suffered injury in fact and (2) whether he is arguably within the zone of interests to be protected—are easily satisfied in the present case. As to the third test, the court could see no convincing evidence that Congress intended to preclude judicial review, the legislative history of Section 307 cited by

[3] Complaint, p. 4.

[4] *Potomac Passengers Association* v. *Chesapeake & Ohio Railway Co., et al., opinion sub nom Congress of Railway Unions* v. *Hodgson,* 326 F. Supp. 68 (D.D.C. 1971).

petitioners being regarded as inconclusive and ambivalent. The court further held that plaintiff's right to sue could be sustained whether the case is analyzed in terms of jurisdiction, existence of a private right of action, or reviewability of administrative action.[5]

REASONS FOR GRANTING THE WRIT

I. THE PROPER CONSTRUCTION OF SECTION 307 OF THE AMTRAK ACT IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE PROMPTLY AND DEFINITIVELY RESOLVED BY THIS COURT.

A. Section 307 Is Critically Important to the Operation of the Entire Congressional Program for Saving Intercity Rail Passenger Service.

On October 14, 1970, Congress enacted the Rail Passenger Service Act of 1970 because "this nation is faced with the immediate threat of complete curtailment of rail passenger service . . ." and thus "positive action and a completely new direction is required—and urgently required now."[6] The Act provided for creation[7] of a National Railroad Passenger Corporation ("Amtrak") to provide intercity rail passenger service between points designated by the Secretary

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[5] In the same opinion the Court of Appeals reversed the judgment of the District Court in the *Potomac Passengers* case, *supra* n. 4, consolidated with this case on appeal. The court held that Section 307 was not involved in that case since the suit, properly conceived, was not one for violation of the Amtrak Act but rather an action for a declaratory judgment that certain trains were "commuter" rather than "intercity" and that their discontinuance was therefore not governed by the Amtrak Act. The correctness of that decision is not at issue here.

[6] House Report No. 91-1580, 1970 *U.S. Code Cong. and Adm. News*, pp. 4736-37.

[7] 45 U.S.C. § 541.

of Transportation as components of a basic national system of intercity rail service.[8] Though vested with wide discretionary authority under the Act, Amtrak is not "an agency or establishment of the United States Government."[9]

Under the Act, Amtrak was authorized to contract with any railroad, on or before May 1, 1971, and between March 1, 1973 and January 1, 1975, to relieve that railroad of its entire responsibility for provision of intercity rail passenger service.[10] Upon entering into such a contract, the railroad could discontinue any intercity train simply by filing with the Interstate Commerce Commission and posting in required places a thirty-day notice of intent to discontinue.[11] Railroads which have not entered into such contracts are forbidden to discontinue any intercity passenger trains before January 1, 1975, and may do so thereafter only by following the discontinuance procedures in Section 13a of the Interstate Commerce Act (49 U.S.C. § 13a).[12] Amtrak is required to provide the service included within the basic system until July 1, 1973, after which it may effect discontinuances as provided in the Act.[13] If "consistent with prudent management," Amtrak may provide intercity rail passenger service in excess of the basic system, and may discon-

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[8] 45 U.S.C. § 521.

[9] 45 U.S.C. § 541.

[10] 45 U.S.C. § 561(a)(1).

[11] *Id.*

[12] 45 U.S.C. § 564(a).

[13] 45 U.S.C. § 564(b).

tinue such service at any time, except that any excess service provided for a continuous period of two years becomes part of the basic system.[14]

In setting up these arrangements, Congress was keenly aware that Amtrak would have to effect a substantial "pairing of uneconomic routes" in order to preserve a viable rail passenger system in this country.[15] Congress also knew that train discontinuances had previously been the subject of "protracted administrative and judicial proceedings" and that members of the public had become increasingly vocal in protesting railroad service which they did not like.[16] Thus Congress realized that the numerous train discontinuances which Amtrak would have to make would certainly spark a widespread round of protest and that passengers whose trains were terminated would undoubtedly feel upset and sue to enjoin such discontinuances if allowed to do so.[17] In addition, of course,

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[14] 45 U.S.C. §§ 563(a), 564(b)(2).

[15] "A rational reduction of the present system will be required to save any passenger service." House Report No. 91-1580, 1970 *U.S. Code Cong. and Adm. News* p. 4737.

[16] Senate Report No. 91-765, 91st Cong., 2nd Sess. (1970), pp. 2-4.

[17] *Compare* District Judge John P. Fullam's observation, quoted in *In re Penn Central Transportation Co.*, 446 F.2d 1109, 1113 (3rd Cir. 1971), *cert. denied* — U.S. — (1972):

> "It is a matter of common knowledge that very many interested persons and governmental entities and agencies question the adequacy of intercity rail passenger service proposed to be supplied by Railpax [Amtrak]. It is not inconceivable that, if they were free to do so, large numbers of such persons, entities and groups might seek to litigate particular issues in a wide variety of forums."

Amtrak and its participating railroads could conceivably be sued for a variety of alleged violations other than discontinuances.

Knowing that such a wave of injunctive actions could easily cripple the bold and innovative railroad reorganization which Amtrak was created to accomplish, Congress included in the statute Section 307 which grants to the District Courts jurisdiction, *upon petition of the Attorney General,* to enjoin any violation of the Act, or any conduct inconsistent with its policies and purposes, committed by Amtrak or any railroad.[18] This provision was taken almost verbatim from Section 403 of the Communications Satellite Act of 1962 (47 U.S.C. § 743) which appoints the Attorney General as a public watchdog "to take appropriate action to safeguard the public interest" with respect to operations of the Communications Satellite Corporation ("Comsat").[19]

Clearly Section 307 of the Amtrak Act was designed to safeguard the public from possible abuses in the

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[18] Section 307 also permits the granting of equitable relief "in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives." Since the present case, like most of those in which passenger groups are interested, does not involve a labor agreement, constant repetition of this second, labor branch of Section 307 will henceforth be avoided wherever possible.

[19] Remarks of Senator Hubert Humphrey during floor debate on the Comsat Act, 108 *Cong. Record* p. 16,697 (Aug. 16, 1962). See also remarks of Senator Albert Gore, 108 *Cong. Record* p. 15,134 (July 31, 1962), and letter of Deputy Attorney General Katzenbach introduced by Senator Mansfield, 108 *Cong. Record,* p. 11,902 (July 27, 1962).

Amtrak program while nevertheless protecting the Corporation from massive litigation prompted by the inevitable train discontinuances and other actions by Amtrak in carrying out its mandate. The section is intimately related to other provisions of the Act barring judicial review of the basic system [20] and providing for greatly simplified discontinuance procedures.[21] In short, the limitations imposed by Section 307 are absolutely critical to the entire operation of the Amtrak program. The present Court of Appeals' decision holding that, despite Section 307, Amtrak may be sued by any railroad passenger who claims to be injured by an alleged violation of the Act [22] effectively emasculates the very purpose underlying that section and threatens substantial, if not fatal, interference with a vital Congressional program for saving this country's intercity rail passenger system.

B. The Construction of Section 307 Is a Threshold Question in Several Pending and Anticipated Federal Cases.

The question of who may sue Amtrak (or a railroad participating in the Amtrak program) is a threshold issue in every action [23] in which a plaintiff other than the Attorney General seeks an injunction for an alleged violation of the Amtrak Act. At least six such actions involving Section 307 are now pending in federal

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[20] 45 U.S.C. § 522.

[21] See text at note 11 *supra*.

[22] App. A, pp. 8a, 27a.

[23] Except for labor cases (see note 18 *supra*).

courts,[24] and it is certain that more actions presenting the issue will be filed soon.[25]

Federal courts presented with such cases are currently faced with a substantial conflict of authority.[26] On the one hand, there is the instant decision and a similar, earlier ruling by the District Court in *Wood* v. *National Railroad Passenger Corporation,* 341 F. Supp. 908 (D. Conn. 1972). On the other hand, the view that such suits may be brought only by the Attorney General, except in labor cases, finds significant support in the three-judge district court opinion in *Quincy College and Seminary Corporation* v. *Burling-*

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[24] These actions are *Schuler, et al.* v. *National Railroad Passenger Corporation, et al.*, No. 72-CV-211 (N.D.N.Y.); *City of New York* v. *National Railroad Passenger Corporation, et al.*, No. 72 Civ. 1988 (S.D.N.Y.); *City of Philadelphia, et al.* v. *Baker, et al.*, No. 71-1002 (E.D. Pa.); *Commonwealth of Pennsylvania, et al.* v. *Baker, et al.*, No. 71-2301 (E.D. Pa); *People of the State of Illinois, et al.* v. *Chicago & North Western Transportation Company*, No. 71C-1009 (N.D. Ill.); and the instant *National Association of Railroad Passengers* v. *Central of Georgia Railway Company, et al.*, No. 71-1546 (C.A.D.C.).

[25] The pending 307 actions were prompted by the first round of Amtrak contracts executed prior to May 1, 1971. Amtrak has recently entered its second contracting phase, *i.e.*, from March 1, 1973 to January 1, 1975, and railroads which sign on with Amtrak during this period are entitled to discontinue trains in the same fashion as those which contracted during the first phase. (45 U.S.C. § 561). In addition, trains within the basic system may be discontinued by Amtrak after July 1, 1973. (45 U.S.C. § 564).

[26] At least one district judge has already indicated to counsel in another Amtrak case that he intends to await this Court's disposition of the present certiorari petition before making any further decisions in his case. *See* letter of United States District Judge James T. Foley concerning *Schuler* v. *National Railroad Passenger Corporation*, Civil Action No. 72-CV-211 (N.D.N.Y.), set out as Appendix D to this petition.

ton Northern, Inc., 328 F. Supp. 808 (N.D. Ill. 1971), *aff'd* 405 U.S. 906 (1972), which upheld the constitutionality of the Amtrak Act partly on the basis of Section 307's grant *to the Attorney General* of authority to seek equitable relief if Amtrak acts contrary to the policies of the Act.[27]

In addition, there is a clear disagreement among the Courts of Appeals on the "public" status of Amtrak. In deciding to apply to Amtrak the same tripartite standing standard developed by this Court in regard to review of action by governmental agencies, *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970), the court below relies strongly on its conclusion that Amtrak is "quasi-public" in character.[28] Yet, in *Miltenberger* v. *Chesapeake & Ohio Railway Co.*, 450 F.2d 971, 974-5 (4th Cir. 1971), the court refused to include Amtrak within

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[27] "A careful reading of the Act demonstrates that sufficient standards and safeguards have been set out by Congress. For instance, under § 308, 45 U.S.C. § 548, Amtrak is required to submit to the President and Congress detailed annual reports of its operations, activities, and accomplishments. In addition, it is made subject to the same safety regulations and labor laws as other common carriers. 45 U.S.C. § 546(b). Also, rail passenger service in excess of the basic system, if implemented, must be 'consistent with prudent management.' 45 U.S.C. § 563(a). *Finally, if Amtrak should not act consistently with the policies of the Act, the United States Attorney General is authorized to go into federal district court to obtain equitable relief.* 45 U.S.C. § 547." (328 F. Supp. at 811, emphasis added.)

[28] Although the point was not discussed by the Court of Appeals, since Section 307 speaks of relief against the Corporation *or any railroad*, the effect of this opinion is also to apply the government agency standing test to the 21 wholly private railroads which have contracted with Amtrak, and even to railroads such as petitioner Southern which have not contracted with Amtrak at all. See App. A, p. 24a.

the reach of certain statutes relating to federal agencies (specifically, the National Environmental Policy Act and the National Historic Preservation Act), noting that Congress' declaration that Amtrak is not a government agency must be honored.

Petitioners submit that the proper interpretation of Section 307 of the Amtrak Act is an issue which is now appropriate for decision by this Court. The Act is passed, the legislative history is complete, and there will be no substantial evidence or insight available later which is not available now. Since the question is a threshold one in several pieces of complex, time-consuming, and expensive litigation, the interests of judicial economy and fairness to all parties militate in favor of as prompt a disposition by this Court as possible.

II. THE COURT OF APPEALS DECISION SERIOUSLY MISCONSTRUES SECTION 307.

While normally, of course, erroneousness of the decision below is not alone a sufficient reason for exercise of this Court's certiorari jurisdiction, there are situations in which granting the writ is an appropriate and necessary method of correcting a serious error, especially when the error threatens substantial interference with a major Congressional program or policy. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 136 (1968); *Williams* v. *Lee*, 358 U.S. 217, 218 (1959). Perhaps because it approached the question with "a strong presumption" in favor of the result reached,[29] petitioners believe the court below seriously misconstrued the plain words of Section 307 and misinterpreted its legislative history, with the con-

[29] App. A, p. 9a.

sequence that a major Congressional program will be subject to serious disruption if the decision below is allowed to stand.

A. The Statutory Language.

Section 307(a) expressly identifies three proper plaintiffs entitled to bring injunctive suits to restrain violations of the Act—the Attorney General (in all cases), or (in cases involving a labor agreement) an affected employee or an employee representative. The section does not identify any class of persons which includes the plaintiff in this case. By the well established principle of *expressio unius est exclusio alterius,* the plain words of the statute indicate that respondent passenger association is not a proper plaintiff. Where Congress expressly provides a particular way of redressing violations of a Congressional enactment, other methods are not to be inferred.[30]

The Court of Appeals' opinion deprecates the weight to be accorded this principle in construing the words chosen by Congress to carry out its legislative intent.[31] But while any rule of statutory construction can undoubtedly be overridden in particular circumstances, general guidelines of this character play a necessary role in construing statutes[32] and should not

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[30] See, *e.g., Calhoun* v. *Harvey*, 379 U.S. 134 (1964); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Blancy* v. *Florida National Bank*, 357 F.2d 27 (5th Cir. 1966); *Powell* v. *Washington Post Co.*, 267 F.2d 651 (D.C. Cir. 1959), *cert. denied*, 360 U.S. 930.

[31] App. A, p. 10a.

[32] The effect of specific designation of a remedy has long been recognized by this Court. See, for example, *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 301 (1943): "All constitutional questions aside, it is for Congress

be ignored unless there is definite indication of a contrary legislative intent.[33] In the present case, the legislative history is compelling that Congress meant exactly what it said.

B. The Legislative History.

In June 1970 a subcommittee of the House Interstate and Foreign Commerce Committee held hearings on H.R. 17849 and S. 3706, the House and Senate bills relating to revitalization of passenger railroads. Representatives of organized labor proposed that Section 307(a) as then drafted[34] should be expanded to reach

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to determine how the rights which it creates shall be enforced . . . In such a case the specification of one remedy normally excludes another." See also *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 720 (1967): "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied."

[33] The court below asserted that Congress would have included the word "only" in Section 307 if it desired to restrict non-labor suits to the Attorney General. Yet Congress' specification of a particular mode of judicial review of administrative action automatically establishes the exclusive review method, and this result does not depend on the use of the word "exclusive" in the statute. *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3rd Cir. 1972), *cert. denied* 93 S.Ct. 937 (Jan. 15, 1973). See also *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.*, — F. Supp. — (N.D. Tex., Jan. 9, 1973).

[34] "If the Corporation engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, obstructs or interferes with any activities authorized by this Act (except in the exercise of labor practices not otherwise proscribed by law), refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, obstruction, interference, refusal, failure or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attor-

all participating railroads, not just Amtrak; that damages, attorneys' fees, and costs should be allowed instead of just equitable relief; and that the identification of who may file a petition for such relief should be broadened to include "any person adversely affected or aggrieved thereby, including the representatives of the employees of any railroad or of the Corporation." [35] In explaining the purpose of the proposed amendment, one of the labor witnesses stated:

> The . . . amendment we propose would modify the language of Section 307(a) . . . so as to provide that any aggrieved party, including employee representatives, could institute legal proceedings for violations of the law. . . .
>
> *As the bill now reads, only the Attorney General, except in cases involving a labor agreement, could bring actions.*[36]

Later, Secretary of Transportation Volpe was asked to comment on these and other proposed changes. His response, in the form of a letter to the Subcommittee, contained the following recommendations:

> Labor proposes that subsection (a) of section 307 be amended to make sanctions available not only against the Corporation but against all railroads. It also proposes that any person adversely affected or grieved, including employee representatives, be permitted to seek relief.

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ney General of the United States or, in a case involving a labor agreement, upon petition of any individual affected thereby, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat."

[Supplemental Hearings on H.R. 17849 and S. 3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2nd Sess. (1970), Serial 91-62, p. 43.]

[35] *Id.* pp. 122, 141.

[36] *Id.* p. 134 (emphasis added).

> Sanctions are normally imposed by the Government. Consequently, *I would be opposed to permitting "any person" to seek enforcement of section 307. I would have no objection, however, if the section were revised to permit employee representatives, as well as employees affected, to seek equitable relief.*[37]

If one compares the original language of Section 307 (footnote 34 *supra*) and the two labor proposals with Section 307 as enacted it becomes crystal clear what determinations Congress made in enacting this provision. As to the question of who should be allowed to bring lawsuits, Congress did *not* follow labor's recommendation that "any person adversely affected or aggrieved" be permitted to file a petition under Section 307. But Congress did not ignore labor's suggestions; rather it expanded the draft version of Section 307 to permit suits by "duly authorized employee representatives" in cases involving labor agreements. In short, Congress went precisely as far, and no farther, than Secretary Volpe recommended.[38]

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[37] *Id.*, p. 85 (emphasis added).

[38] Under the Act the Secretary of Transportation has wide responsibility for setting up and supervising the Amtrak program. (*See*, e.g., 45 U.S.C. §§ 521, 522, 548, 563, 602, 621, 645). As this Court has noted, courts customarily respect construction of an administrative statute given "by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). Additionally, as petitioners informed the Court of Appeals, the Attorney General has taken the position that he has the exclusive right to petition for injunctions in all Amtrak Act cases except those involving labor agreements. *See* Supplemental Appendix to Brief of Appellee National Railroad Passenger Corporation, set out as Appendix E hereto.

C. The Court of Appeals Analysis.

The Court of Appeals opinion seems to petitioners to strain mightily to avoid the clear import of this statutory language and legislative history. In the court's view, Congress may have chosen to reject the "any person" language proposed by labor, not because it wished to foreclose such suits, but because it did not see anything in Section 307 to bar them.[39] Thus, the court adopts a novel construction under which Section 307 gives the Attorney General (and employees and their representatives) the right to seek injunctions for violations of the Act *and* for any action, practice, or policy which, though not a direct violation, is nonetheless inconsistent with the purpose of the Act, while *other* injured parties, including affected railroad passengers and associations, may only seek injunctions to restrain actual violations. These latter suits may be brought, the court holds, not under Section 307 of the Amtrak Act, but under 28 U.S.C. § 1337.[40]

It seems to petitioners that this interpretation of the Act proves too much. Section 307 is entitled "Jurisdiction of the district courts of the United States to impose sanctions." Such a specific jurisdictional grant in a particular Congressional enactment must supersede the general jurisdictional grant of 28 U.S.C. § 1337.[41] If this were not so, the tremendous prolifera-

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[39] App. A, p. 17a.

[40] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

[41] *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943), cited by petitioners for this proposition, is distinguished by the court on the grounds that judicial review was there unnecessary to prevent obliteration of a Congressionally created right

tion of statutes enacted under the commerce clause would virtually guarantee that, regardless of what specific jurisdictional provisions Congress might insert in particular statutes, any allegedly injured party could gain entry to federal court by relating his claim to some act of Congress affecting trade or commerce.

Furthermore, even assuming that Section 1337 provides a jurisdictional basis for suit, which we deny, the question still remains whether a passenger association has an enforceable cause of action on which to sue? Section 1337 provides for suits "arising under any Act of Congress regulating commerce." Thus, we are once again remanded to the Amtrak Act to see if that Act gives rise to any such private cause of action as respondent here asserts. There clearly is no section of the Act which does so. The section which does expressly create rights of action—Section 307—vests them in the Attorney General and, in labor cases, affected employees and representatives.[42]

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because a neutral agency (the Mediation Board), was already acting to resolve disputes administratively. Similarly, here two neutral agencies (the Departments of Transportation and Justice) are actively involved in establishing the Amtrak program and monitoring its operation, and there is also limited judicial review through the Attorney General and all affected employees. The court also noted that *Switchmen's* grew out of a field relegated to conciliation and mediation rather than judicial review, whereas railroad discontinuances have long been subject to administrative and judicial review. But the Amtrak Act expressly embodies a radical departure from past practice—under 45 U.S.C. § 561(a), any railroad participating in the Amtrak program need only file a thirty-day notice to discontinue an intercity train, the old hearing and review procedure of Section 13a of the Interstate Commerce Act having been totally dispensed with.

[42] Cases such as *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), and *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), cited by the Court of Appeals for implying such a private right of action here are inapposite. Unlike the Securities Exchange Act of 1934

The Court of Appeals reasoned that a broad right of private plaintiffs to sue was necessary in order to insure that Congress' objective of saving passenger train service is met by complete compliance with the terms of the Act. The court implicitly concluded that the Attorney General simply could not adequately monitor the possible situations in which Amtrak Act violations may occur. That, we submit, is entirely erroneous.[43] Moreover, issues as to alleged violation of the Amtrak Act, which involve matters of statutory construction and overall implementation of the program, are peculiarly the kinds of issues which the Department of Justice

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or the Voting Rights Act of 1965, the Amtrak Act does not seek to establish positive, enforceable rights in a broad class of individuals but attempts to rescue a threatened national resource by creating a new institution (Amtrak) to provide intercity rail passenger service. The Act is not ambiguous; it clearly defines who may bring enforcement actions—the Attorney General. And the scope of possible violations is well within the Attorney General's enforcement power—while there may annually be hundreds or thousands of Security Act violations or voting frauds throughout the country, the suits alleging violations of the Amtrak statute are not so numerous as to suggest that the Attorney General cannot monitor the way Amtrak is conducting its business and bring suits therefor if necessary. In such circumstances, no private right of action should be implied. *Calhoun* v. *Harvey*, 379 U.S. 134 (1964); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *B. F. Goodrich Co.* v. *Northwestern Industries, Inc.*, 424 F.2d 1349 (3rd Cir. 1970), *cert. denied* 400 U.S. 822; *Blaney* v. *Florida National Bank*, 357 F.2d 27 (5th Cir. 1966); *Noel Estate, Inc.* v. *Commercial National Bank of Shreveport*, 232 F.2d 483 (5th Cir. 1956).

[43] The Department of Justice has established an Amtrak section to review claims of improper actions by Amtrak or the railroads and to participate in federal court proceedings where appropriate. (See Appendix E hereto). In the instant case, attorneys in that section *did* study the complaint of respondent National Association of Railroad Passengers and concluded that the Amtrak-Central of Georgia contract does not violate the Act. (Supplemental Memorandum of Appellee National Railroad Passenger Corporation, p. 5).

can and should consider, together with the Department of Transportation, thus promoting a rational and unified conception of the Act's provisions which will protect the program from inconsistent and debilitating litigation instituted by various private parties across the country.

Because this is so, successful implementation of the legislative scheme required Congress to include within the framework of the Act a provision to insure that enforcement actions would be brought only by an informed governmental agency acting in the exercise of its discretion and with due regard for the overall administration of the Amtrak legislation. Section 307, appointing the Attorney General as the public's overseer of Amtrak's conduct under the Act, is that provision.

CONCLUSION

The interpretation of Section 307 reached by the Court of Appeals does not square with the plain words of the statute, its legislative history, or a proper conception of the purpose of the Act. Indeed, that interpretation threatens to emasculate a key part of the entire statutory scheme. The issue is a pure question of statutory construction and does not require further consideration and refinement by lower courts prior to disposition by this Court. It is a threshold question in a number of pending and anticipated federal cases which, if allowed to proceed on their merits, will be complex, time-consuming, and expensive. In sum, implementation of the Congressional program for saving intercity passenger rail service requires as speedy a reversal by this Court as possible.

The Amtrak Act was designed by Congress to deal with a virtual emergency situation in the nation's rail-

road service. As noted by the Court of Appeals for the Third Circuit,

> *It has become painfully apparent that the condition of the nation's railroads is eroding daily.* Services are being cut back, existing services are deteriorating, and the availability of working capital has become critically limited. Reacting to an ever worsening rail passenger crisis, Congress enacted the Rail Passenger Service Act of 1970, supra. . . . *The legislative history of the Act and the findings therein make clear that Congress regarded as imperative the timely implementation of the Act.*
>
> *In Re Penn Central Transportation Co.*, 457 F.2d 381, 386 (3rd Cir. 1972), emphasis added.

For all these reasons, petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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APPENDIX A

[Court of Appeals Opinion and Judgment]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1321

POTOMAC PASSENGERS ASSOCIATION, APPELLANT

v.

CHESAPEAKE & OHIO RAILWAY COMPANY AND BALTIMORE & OHIO RAILROAD COMPANY

No. 71-1546

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, APPELLANT

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY AND NATIONAL RAILROAD PASSENGER CORPORATION

Appeals from the United States District Court
for the District of Columbia

Decided January 5, 1973

Messrs. Pierre E. Dostert and *Gordon P. MacDougall* for appellants.

Mr. Charles A. Horsky, with whom *Mr. William D. Iverson* was on the brief, for appellees Central of Georgia Railway Company and Southern Railway Company.

Mr. William O. Bittman, with whom *Mr. Curtis E. von Kann* was on the brief, for appellee National Railroad Passenger Corporation.

Mr. Robert O. Smith, Jr. was on the brief for appellees Chesapeake & Ohio Railway Company and Baltimore & Ohio Railroad Company. *Messrs. Francis M. Shea* and *Richard T. Conway* also entered appearances for appellees in No. 71-1321.

Before BAZELON, *Chief Judge,* and WRIGHT and WILKEY, *Circuit Judges.*

WRIGHT, *Circuit Judge:* This consolidated appeal consists of two separate cases, each concerning interpretation of the recently enacted Rail Passenger Service Act of 1970, 45 U.S.C. § 501 *et seq.* (1970) (hereinafter referred to as the Amtrak Act). These cases were initially consolidated because it appeared that they presented the same or closely related legal issues, namely (1) whether parties other than the Attorney General, employees and employee representatives have standing to sue the National Rail Passenger Service Corporation (hereinafter Amtrak) or individual railroads for violations of the Amtrak Act; (2) whether federal district courts have jurisdiction over suits brought by litigants other than the Attorney General, employees and employee representatives to enjoin Amtrak or individual railroads from violating the Amtrak Act; and (3) whether the Amtrak Act creates a private right of action in favor of parties injured by violations of the Act.

It now appears, however, that the appeal in No. 71-1321 involves a question much different from those listed above,

namely: Does a federal district court have jurisdiction to determine whether a specific train provides "intercity rail passenger service" or "commuter and other short-haul service" within the meaning of the Amtrak Act? If the train provides "intercity rail passenger service" it may properly be discontinued under the authority of the Amtrak Act without any review by the regulatory commissions of the states through which it passes or by the Interstate Commerce Commission. If it provides "commuter and other short-haul service," on the other hand, its discontinuance is neither authorized nor prohibited by the Amtrak Act, but rather is subject to the pre-existing jurisdiction of state regulatory commissions or the ICC. To avoid any further confusion between the issues involved in these two cases, our opinion will treat each case separately.

No. 71-1546

This case requires us to decide whether injured and aggrieved parties have standing to seek injunctions against violations of the Amtrak Act, or whether Section 307 of the Act, 45 U.S.C. § 547, bars suits by all parties other than the Attorney General of the United States, employees and employee representatives. Since the case is here on an appeal from a dismissal for lack of standing to sue and the District Court never reached the merits, we may accept plaintiff's-appellant's version of the facts. Appellee Central of Georgia Railway Company (Central) filed a notice of discontinuance [1] for its "Nancy Hanks" passen-

[1] The Act requires that railroads discontinuing trains give notice in accordance with the notice procedures in § 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1) (1970). *See* 45 U.S.C. § 561(a)(1) (1970). Since the purpose of the Act is to allow discontinuances of intercity rail passenger service without approval of either the ICC or state regulatory agencies, this notice does not invoke the jurisdiction of the ICC; it merely serves to give passengers advance warning

ger train which operates between Savannah and Atlanta, Georgia, and for two other trains operating between Albany and Birmingham, Georgia. Appellant National Association of Railroad Passengers, a national organization of railroad patrons, sought to enjoin the discontinuances on the ground that they violated Sections 404(a) and 802 of the Amtrak Act, 45 U.S.C. §§ 564(a) and 642.

Section 802 provides that "no railroad may discontinue any intercity rail passenger service whatsoever other than in accordance with the provisions of this chapter • • •." Section 404(a) bars a railroad from discontinuing any of its intercity passenger trains prior to January 1, 1975, unless that railroad has entered into a contract with Amtrak pursuant to Section 401(a)(1) of the Act, 45 U.S.C. § 561(a)(1). The latter provision authorizes Amtrak to contract with a railroad "to relieve the railroad • • • of its entire responsibility for the provision of intercity rail passenger service." Although Central has entered into a contract with appellee Amtrak to relieve Central of its entire responsibility for intercity rail passenger service, appellant contends that Central and Amtrak have not complied with Section 401(a)(1) because Central is but a subsidiary of appellee Southern Railway Company (Southern) which has not entered into a contract with Amtrak. In appellant's view, then, the Act requires that Amtrak either enter into a contract to relieve Southern of its entire responsibility for intercity rail passenger service or enter into no contract at all. After oral argument on appellant's motion for a temporary restraining order, the District Court dismissed the action on the ground that appellant did not have standing to maintain this action under Section 307 of the Act. We reverse and remand.

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of the discontinuance. *See* Ex Parte Order No. 217, 36 FED. REG. 5219, 5220 (March 18, 1971); 49 C.F.R. § 1122.9 (Oct. 1, 1972).

I

The parties have suggested several characterizations of the issue presented. Appellant accepts the "standing" characterization employed by the District Court. Central and Southern suggest that this is incorrect and that the real issue is whether a private right of action exists to restrain an alleged violation of the Amtrak Act. Amtrak suggests that the issues are, first, whether the District Court has jurisdiction to entertain this action at the instance of this plaintiff and, second, whether the action of Amtrak and the railroads is reviewable at the behest of this plaintiff.

The fine distinctions among the doctrines of standing, jurisdiction, reviewability, and causes of action often pose thorny problems for the law. *Compare Data Processing Service* v. *Camp,* 397 U.S. 150 (1970), *with Barlow* v. *Collins,* 397 U.S. 159, 167 (Mr. Justice Brennan, concurring in the result and dissenting). *Compare Bell* v. *Hood,* 327 U.S. 678, 679 (1946) (majority opinion), *with id.* at 685 (Mr. Chief Justice Stone, dissenting). Fortunately, however, we need not resolve these problems here, for in this case analysis of all these doctrines leads to the same conclusion—allowing adjudication of the merits. Our opinion focuses on standing, but we will also demonstrate that analyzing the case under the doctrines of jurisdiction, reviewability, and private causes of action achieves an identical result.

II

At the outset, we reject the position that the doctrine of standing is wholly inapplicable to this case. It is argued that the standing doctrine has developed solely in the context of determining what persons or groups may challenge the action of a government official or agency, a matter not involved in this case since the Amtrak Act specifically provides that Amtrak is not an agency or instrumentality of

the federal government. *See* 45 U.S.C. § 541. Most applications of the doctrine of standing, it is true, involve review of administrative agencies. *See, e.g., Data Processing Service* v. *Camp, supra; Barlow* v. *Collins, supra; Sierra Club* v. *Morton,* 405 U.S. 727 (1972). However, the doctrine is by no means limited to such situations. The question of standing arises in determining who is a proper plaintiff to adjudicate the constitutionality of statutes and ordinances. *See Flast* v. *Cohen,* 392 U.S. 83 (1968); *Baker* v. *Carr,* 369 U.S. 186, 204-208 (1962); *City of Chicago* v. *Atchison, Topeka & Santa Fe R. Co.,* 357 U.S. 77 (1958). More relevant to our own case, standing has been recognized as an issue in determining who is a proper plaintiff to assert that a corporation created by the Government is violating its statutory authority. *See Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 (1968).

A. *The applicable standard.*

Recent Supreme Court cases have announced a three-part test to determine whether a plaintiff has standing to seek judicial review of administrative action. As set forth in *Data Processing, supra,* those tests are: (1) whether the plaintiff has alleged that he suffered injury in fact, economic or otherwise, 397 U.S. at 152; (2) whether the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question, 397 U.S. at 155-156; and (3) whether judicial review has been precluded by the legislature, 397 U.S. at 156. *See also Barlow* v. *Collins, supra,* 397 U.S. at 164-165. It appears from *Data Processing,* a case involving review of administrative action, that this tripartite test represents both a formulation of Article III's "case" or "controversy" requirement [2] and an interpretation of the Administrative Procedure Act (APA),

[2] The Supreme Court's most recent cryptic pronouncement on standing seems to indicate that the standing test may be

5 U.S.C. §§ 701(a)(1) and 702 (1970). *See Data Processing Service* v. *Camp, supra,* 397 U.S. at 153, 156. *See also Barlow* v. *Collins, supra,* 397 U.S. at 169-170, 173-175 (Mr. Justice Brennan, concurring in the result and dissenting). The question arises, then, whether the same tripartite test should govern standing to sue a corporation that is neither an agency of the federal government nor subject to the APA.

Public policy favors adopting a standing test as liberal as that which has arisen in the administrative law context to determine whether a given plaintiff can sue a congressionally created corporation to enjoin it from violating its enabling statute. A significant aspect of recent standing decisions is a recognition that judicial review is necessary to ensure the integrity of federal regulatory programs, an integrity that is violated as much when a corporation created by the Government violates its enabling act as when a Government agency violates the law. *See Ballerina Pen Co.* v. *Kunzig,* 140 U.S.App.D.C. 98, 102 n.8, 433 F.2d 1204, 1208 n.8 (1970), *cert. dismissed,* 401 U.S. 950 (1971). What we said there with respect to administrative agencies is also pertinent to judicial overview of the actions of Government-created corporations:

> "* * * Logic tells us that Congress lays down the statutory framework within which the various agencies it establishes are to operate with very definite goals in mind—the agencies are designed to function according to the will of Congress; they are not given life, breadth and scope of their own to function as they see fit; rather, they must function as Congress intended them to function. * * *"

140 U.S.App.D.C. at 101-102, 433 F.2d at 1207-1208.

It is also important to note that, while the Amtrak Act states that Amtrak is not a Government agency, the cor-

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based solely on the APA. *See Sierra Club* v. *Morton,* 405 U.S. 727, 732 n.3 (1972). *See also* note 10 *infra.*

poration has several features making it, in the words of the Secretary of Transportation, "quasi-public."[3] For example, a majority of the corporation's board of directors is appointed by the President. 45 U.S.C. § 543(a). The corporation received its initial financing from the United States Treasury, *see* 45 U.S.C. § 601, and continued financing is facilitated through Government guarantees on corporate obligations, *see* 45 U.S.C. § 602. Amtrak's books and records are to be audited by the Comptroller General of the United States, *see* 45 U.S.C. § 644(2)(A), and the results of audits are to be made available to the Congress, *see* 45 U.S.C. § 644(2)(B). Because of Amtrak's quasi-public character, and the consequential public interest in ensuring that its actions conform to its legislative mandate, we conclude that the liberal tripartite standing test developed by the Supreme Court in the administrative agency context should be used to determine whether appellant has standing to seek judicial review of actions by Amtrak allegedly in violation of its enabling act.

B. *Application of the* Data Processing *standing test to this case.*

The first two tests are easily satisfied. With respect to the injury in fact requirement, the National Association of Railroad Passengers alleged in its complaint that it has a number of members in the affected area of the State of Georgia who would suffer from any discontinuance of the Nancy Hanks. *Compare Sierra Club* v. *Morton, supra.* The interest sought to be protected by the Association is clearly within the zone of interests to be protected by the Amtrak Act. That railroad passengers were the intended benefici-

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[3] Supplemental Hearings on H.R. 17849 & S. 3706 Before Subcommittee on Transportation & Aeronautics, House Committee on Interstate & Foreign Commerce, 91st Cong., 2d Sess., at 67-68 (1970) (hereinafter cited as Supplemental Hearings).

aries of the Act is obvious from the congressional findings and declaration of purpose in Section 1 of the Act, 45 U.S.C. § 501:

> "The Congress finds that modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country; * * * that the traveler in America should to the maximum extent feasible have freedom to choose the mode of travel most convenient to his needs * * *. * * *"

The only complicated issue in this case is the third part of the *Data Processing* test, namely, whether Congress intended to preclude standing for this plaintiff. It is important to emphasize that we do not begin our analysis of this issue from a neutral posture, but rather from a strong presumption in favor of judicial review. Where there is no express denial of judicial review, the issue is whether "nonreviewability can fairly be inferred," *Barlow* v. *Collins, supra,* 397 U.S. at 166, and, as Mr. Justice Douglas emphasized, preclusion of judicial review "is not lightly to be inferred." *Ibid.* Judicial review "is the rule, and nonreviewability an exception which must be demonstrated." *Ibid.* It is "'only upon a showing of "clear and convincing evidence" of a contrary legislative intent' that the courts should restrict access to judicial review." *Id.* at 167, *quoting Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 141 (1967). It is with this strong presumption in mind that we now turn to analyze whether we can infer congressional intent to preclude judicial review from either (1) the language of the Act itself, (2) the legislative history, or (3) the Act's purpose.

1. *Implications to be drawn from the statute itself.*

Section 307 of the Amtrak Act, 45 U.S.C. § 547, provides:

"(a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilites under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

"(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter."

Appellees contend that under the well established maxim of statutory construction *expressio unius est exclusio alterius* the statute's express provision of standing for the Attorney General, employees and employee representatives must be read as an implied exclusion of standing for other parties. We think too much is made of the maxim in this case. Whatever superficial appeal the maxim may have, courts have often noted that it must be applied with a certain degree of caution. It is only an aid to statutory construction, not a rigid rule of law. *Neuberger* v. *C.I.R.*, 311 U.S. 83, 88 (1940); *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 1 Cir., 312 F.2d 214, 220 (1963), *affirmed*, 377 U.S. 235 (1964); *Renken* v. *Harvey Aluminum (Incorporated)*, D. Ore., 226 F.Supp. 169, 175 (1963). The Supreme Court has recognized that rules of statutory construction such as this

"come down to us from sources that were hostile to-

> ward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."

S.E.C. v. *Joiner Corp.*, 320 U.S. 344, 350-351 (1943) (footnotes omitted). *See also Springer* v. *Philippine Islands*, 277 U.S. 189, 207 (1928); *F.T.C.* v. *Standard Motor Products, Inc.*, 2 Cir., 371 F.2d 613, 617-618 (1967); *Hunt Foods & Industries, Inc.* v. *F.T.C.*, 9 Cir., 286 F.2d 803, 807 (1960), *cert. denied*, 365 U.S. 877 (1961); *Matheson* v. *Armbrust*, 9 Cir., 284 F.2d 670, 674 (1960), *cert. denied*, 365 U.S. 810 (1961). Another court has noted:

> "• • • The doctrine *expressio unius est exclusio alterius* is at best an unreliable basis for ascertaining intention. Its premise is that the draftsman has made a comprehensive review of all possible related provisions, from which the inference is to be drawn that his silence indicates a discriminating judgment of rejection. Such a conclusion usually is unrealistic, for it assumes too much foresight in the draftsman. • • •".

Durnin v. *Allentown Federal Savings & Loan Assn*, E.D. Pa., 218 F.Supp. 716, 719 (1963). *See also* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 290-291 (1963).

It seems reasonable to us that the express provision of standing for the Attorney General was not an attempt to *bar* other injured and aggrieved parties from bringing suit, but rather an attempt to *authorize* the Attorney General to bring suit to enforce what otherwise might be viewed as private rights. *See Wood* v. *National Railroad Passenger Corp.*, D. Conn., 341 F.Supp 908, 912 (1972). *Cf. Allen* v.

State Board of Elections, 393 U.S. 544, 555 n.18 (1969). The very brief explanation of Section 307 in the section-by-section analysis of the House Report comports with this view. "Section 307 authorizes the Attorney General of the United States to sue the corporation or any railroad to prevent acts of omission or commission in violation of this legislation." H.R. Rep. No. 91-1580, 91st Cong., 2d Sess., at 9 (1970).

That Congress intended to authorize suits by the Attorney General, and not to bar suits by other parties, is also evident in the scope of authority granted to the Attorney General. He is not simply given power to seek injunctions against violations of the Act, but is authorized to bring suit against Amtrak or any railroad for any actions that obstruct, interfere with, or are inconsistent with the policies of the Act. He is not only authorized to remedy ongoing violations, but any threatened violation, interference, refusal, failure or neglect. By singling out the Attorney General, Congress did not attempt to provide the sole means for litigating violations of the Act, but merely emphasized, even to the point of redundancy, that the Attorney General had broad powers to seek equitable relief under the Act. It was quite understandable for Congress to want to make this clear. The proposal to set up a quasi-public corporation to operate the railroads was, in the words of Senator Prouty, the proposal's draftsman, "a departure from the traditional ways of assisting vital segments of our national transportation system."[4] It was, in the words of other members of Congress, "novel," "ingenious," "imaginative," and "innovative."[5] Given the novelty of the proposal, Congress undoubtedly felt that it could neither foresee nor spell out all the kinds of actions by Amtrak or the railroads that might be inconsistent with the Act's policies. Congress

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[4] S. Rep. No. 91-765, 91st Cong., 2d Sess., at 77 (1970).

[5] 116 CONG. REC. (Part 27) 36597, 36598, 36895 (1970).

therefore want to make it clear that the judiciary, at the behest of the Attorney General, had power to read between the lines of the statute and to enjoin actions or threatened actions which, though not necessarily violations of any express provision of the Act, interfered with the Act's purpose of revitalizing intercity rail passenger service. There is no reason to read into this congressional emphasis an implied purpose to bar other parties from litigating ongoing violations of express provisions of the Amtrak Act.

We might also note that were we to adopt appellees' interpretation of the statute Amtrak and the railroads would be unable to sue each other for violation of their mutual obligations under the Act. For example, should a railroad ignore its obligation to compensate Amtrak under Section 401(a)(2) of the Act, 45 U.S.C. § 561(a)(2), Amtrak would be unable to go into court and sue for the money owed since such a suit would be for a failure to discharge a responsibility under the Act and thus within the scope of Section 307. It is hard to believe that, having given Amtrak a broad mandate to revitalize the nation's intercity rail service, the Congress would have hampered it in this fashion. Amtrak is by statute a for-profit corporation, *see* 45 U.S.C. § 541, and we presume Congress intended it to have those powers vital to a profit-making enterprise, including the power to bring suit against those with whom it contracts. We hesitate to interpret Section 307 in a manner which would deny it that power.

Turning to the reference in Section 307 to suits by employees and their representatives, appellees argue that to allow any injured and aggrieved party to sue for violations of the Act would turn this provision into mere surplusage and that such an interpretation should be avoided. *See, e.g., McDonald* v. *Thompson*, 305 U.S. 263, 266 (1938); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932). We reject this reasoning on two grounds. First, like the Attorney General, employees and their representatives are

not only empowered to litigate actual violations of the Act; they can bring suit against any actual or threatened "action, practice, or policy inconsistent with the policies and purposes" of the Act. To permit other parties to seek injunctions against actual violations of express provisions of the Act does not turn this language into surplusage, for labor's authority to sue is much broader. Second, it is reasonable to assume that Congress wanted to take special precautions to make it clear that employees and their representatives had standing under the Act. Because the primary purpose of the Act was to improve intercity rail passenger service for the benefit of passengers, Congress might well have feared that under the *Data Processing* standing test employees and their representatives would not have been considered members of the class intended to be protected by the legislation, at least not in all cases in which their interests were affected. *See Data Processing Service* v. *Camp, supra,* 397 U.S. at 154-156; *Barlow* v. *Collins, supra,* 397 U.S. at 164-165. That Congress merely intended to emphasize the rights of labor is evident from other provisions of the Act. For example, Section 405(a), 45 U.S.C. § 565(a), requires railroads to make "fair and equitable arrangements to protect the interests of employees affected by discontinuances of intercity rail passenger service • • •" and other subsections define the substantive content of such arrangements. Despite the clarity of this requirement, Section 401 (a) of the Act, 45 U.S.C. § 561(a), again emphasizes that a valid contract under the Act must include protective arrangements for employees. We are therefore confident that, by singling out employees and their representatives in Section 307, Congress was not attempting to prevent other parties from bringing suit, but was simply making it abundantly clear that labor's interests would be protected as well.

Since we can explain the express provision of standing in the Attorney General, employees and employee repre-

sentatives on grounds unrelated to any congressional intent to preclude other injured and aggrieved parties from bringing suit, we cannot reasonably infer from the statutory language an intent to bar other parties from bringing suit, especially in light of the strong presumption in favor of review with which we began our analysis.

2. *Implications to be drawn from the legislative history.*

As originally drafted, Section 307 provided jurisdiction "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any individual affected thereby * * *." S. 3706, 91st Cong., 2d Sess., § 307(a) (May 7, 1970), reprinted in Supplemental Hearings, *supra* note 3, at 44. The National Legislative Director of the United Transportation Union presented the Subcommittee with an amendment that would have deleted the phrase "in a case involving a labor agreement, upon petition of any individual affected thereby" and would have substituted the phrase "of any person adversely affected or aggrieved thereby, including the representatives of the employees of any railroad or of the Corporation."[6] He claimed that the amendment was designed "[t]o provide a legal remedy to any aggrieved person including the duly authorized representatives of the employees of the railroads and of the Corporation for any violations of the Act by the Corporation or by any railroad."[7] Following this testimony, the General Counsel of the Railway Labor Executives Association appeared before the Subcommittee and introduced a similar amendment. He stated:

> "The third substantive amendment we propose would modify the language of section 307(a) on pages 14 and 15 of the bill so as to provide that any aggrieved party, including employee representatives, could institute legal proceedings for violations of the law.

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[6] Supplemental Hearings, *supra* note 3, at 122.

[7] *Ibid.*

> "As the bill now reads, only the Attorney General, except in cases involving a labor agreement, could bring such actions . . . ."[8]

Later, Secretary of Transportation Volpe offered some comments on the proposed amendments. His letter to the Committee stated:

> "Labor proposes that subsection (a) of section 307 be amended to make sanctions available not only against the Corporation but against all railroads. It also proposes that any person adversely affected or grieved [*sic*], including employee representatives, be permitted to seek relief.
>
> "Sanctions are normally imposed by the Government. Consequently, I would be opposed to permitting 'any person' to seek enforcement of section 307. I would have no objection, however, if the section were revised to permit employee representatives, as well as employees adversely affected, to seek equitable relief."[9]

As is evident from the language of Section 307 as enacted, the Committee never adopted the proposed amendment. Rather it changed the phrase "in a case involving a labor agreement, upon petition of any individual aggrieved thereby" to read "in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives."

Appellees suggest that the Committee's refusal to adopt the proposed amendment indicates Congress' intent not to allow any person aggrieved to have standing to sue. While the argument has a superficial appeal, we are constrained to reject its implications. Interpretation of statutes cannot safely rest upon changes made in congressional committee without explanation. *Trailmobile Co.* v. *Whirls*, 331 U.S.

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[8] *Id.* at 134.

[9] *Id.* at 85.

40 (1947). Courts should avoid delving into "legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260 (1945). Especially is this true when a court is asked to draw inferences from congressional failure to adopt proposed amendments to legislation. "Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment • • • including the inference that the existing legislation already incorporated the offered change." *United States* v. *Wise,* 370 U.S. 405, 411 (1962).

In the instant case we are unable to draw inferences from the legislative history with any confidence. The proposed amendment was never debated or criticized by members of Congress so that failure to adopt the amendment might reasonably be construed to be congressional rejection of that which the amendment provided for. *Compare National Automatic Laundry & Cleaning Council* v. *Shultz,* 143 U.S. App.D.C. 274, 291, 443 F.2d 689, 706 (1971). The Committee might well have believed, notwithstanding the remarks of railway labor representatives, that Section 307 as originally drafted did not bar suits by all injured and aggrieved parties.[10] Indeed, the only mention of the scope

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[10] It is also conceivable that the Committee rejected labor's proposed amendment because it may have constituted an unconstitutional expansion of federal jurisdiction. As quoted in text, the amendment would have permitted any person "adversely affected *or* aggrieved" to bring suit. (Emphasis added.) Since the provision was worded in the alternative, it may reasonably have been read to allow persons who are aggrieved but not injured to bring suit. The Supreme Court had indicated, prior to passage of the Amtrak Act, that the "case" or "controversy" requirement of Article III required that the plaintiff himself be injured in fact. *See, e.g., Data Processing Service* v. *Camp,* 397 U.S. 150, 152 (1970). There

of Section 307 during debate on the floor of Congress suggests that Congress interpreted the section to permit such suits. When the Senate considered the Amtrak Act, it had before it both the proposal by Senators Hartke and Prouty (the one eventually enacted into law) and a competing proposal put forth by Senators Pell and Kennedy. In support of his proposal, Senator Kennedy introduced into the Congressional Record a chart summarizing the basic differences between the two proposals. Looking at the item on the chart called "Sanctions," we find this simple notation to describe both proposals: "In Federal District Court by affected parties for violations of Act." 116 CONG. REC. (Part 11) 14275 (1970). At least one member of Congress, therefore, thought the Act, as reported from committee, did allow suits by "affected parties." And there is no indication that any member of Congress thought otherwise.

Nor do we find it significant that labor representatives testifying at the comittee hearings said that the Act, as originally drafted, barred all parties other than the Attorney General and employees from bringing suit. The

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was substantial scholarly debate as to whether the Court's standing tests were in fact constitutionally required. *See, e.g.*, Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L. J. 816 (1969).

If injury in fact was required by Article III's case or controversy requirement, then settled principles of law, dating back to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), indicated that Congress had no power to expand the jurisdiction of federal courts beyond the scope of Article III to cases in which the plaintiff was not injured in fact. Congress might well have believed, therefore, that the proposed amendment was unconstitutional.

It was not until after enactment of the Amtrak Act that the Supreme Court, in a footnote seemingly inconsistent with recent pronouncements such as *Data Processing*, said that "where a dispute is otherwise justiciable" the question of

individual opinions of witnesses at hearings are of dubious value in interpretation of legislation. *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931); *Pacific Ins. Co.* v. *United States*, 9 Cir., 188 F.2d 571, 572, *cert dismissed*, 342 U.S. 857 (1951); *United States* v. *Kung Chen Fur Corp.*, Ct. Cus. & Pat. App., 188 F.2d 577, 584 (1951); *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 80 U.S.App.D.C. 119, 122, 149 F.2d 507, 510 (1945), *affirmed*, 326 U.S. 446 (1946).

Finally, the Act itself indicates that where Congress intended to preclude judicial review it knew very well how to make its wishes clear. Section 201, 45 U.S.C. § 521, provides that the Secretary of Transportation is to designate a "basic system" of points between which intercity passenger trains shall be operated, and Section 401(b) of the Act, 45 U.S.C. § 561(b), requires Amtrak to operate trains within the basic system unless such trains are being operated by carriers not contracting with Amtrak or by regional transportation agencies. Section 202 of the Act, 45 U.S.C. § 522, expressly provides with respect to review of the Secretary's determination of the basic system: "The basic system as designated by the Secretary shall become effective for the purposes of this chapter upon the date that the final report of the Secretary is submitted to Congress *and shall not be reviewable in any court.*" (Emphasis added.) Congress could just as easily have made clear its desire to limit the right to seek review to the Attorney General and labor by placing the word "only" before the phrase "upon petition of the Attorney General • • •" in the statute. *Compare Wood* v. *National Railroad Passenger Corp.*, *supra*, 341 F.Supp. at 911, *with Congress of Railway Unions* v. *Hodgson*, D. D.C., 326 F.Supp. 68, 78

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standing "is one within the power of Congress to determine." *Sierra Club* v. *Morton*, *supra* note 2, 405 U.S. at 732 n.3.

(1971). That it failed to do so indicates to us that it had no intent to bar other parties from seeking judicial review.

3. *Implications to be drawn from the purposes of the Amtrak Act.*

A command of a statute to preclude judicial review may sometimes be inferred from its purpose. *Barlow* v. *Collins, supra,* 397 U.S. at 167. *See also Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943). It is argued that to allow all injured and aggrieved parties to sue for violations of the Amtrak Act will subject the railroads and Amtrak to crippling litigation, involving massive expenses and distractions, which may well prevent them from devoting adequate time, money and attention to the task for which Congress brought Amtrak into being, namely, saving the country's intercity rail passenger service.

Although such arguments as these normally carry little weight, they merit some discussion here. The legislative history makes it quite clear that one of Congress' purposes in enacting the Amtrak Act was to enable railroads to discontinue uneconomical trains that were draining their resources. The House Report recognized:

> "In order to achieve economic viability in a basic rail passenger system, the Secretary [of Transportation] stated that there will have to be a 'paring of uneconomic routes'. • • •
>
> "In other words, a rational reduction of present service will be required to save *any* passenger service. • • •" [11]

The legislative history also indicates that one of the faults of the system prior to passage of the Amtrak Act was that uneconomical trains could not be discontinued until after lengthy administrative hearings before the ICC and appeals before three-judge District Courts from ICC rul-

[11] H.R. Rep. No. 91-1580, 91st Cong., 2d Sess., at 3 (1970). (Emphasis in original.)

ings.[12] The Amtrak Act dealt with this problem by providing that railroads entering into a contract could immediately terminate all of their intercity rail passenger service. *See* 45 U.S.C. § 561(a)(1).

But we are unable to conclude from this legislative purpose that Congress intended to deny standing to injured and aggrieved passengers. It must not be forgotten that the chief purpose of the Amtrak Act was to save the passenger train from extinction. "The basic purpose of this bill is to prevent the complete abandonment of intercity rail passenger service * * *." H.R. Rep. No. 91-1580, *supra*, at 1. Congress intended to ensure survival of the passenger train by enacting an elaborate regulatory system which would encourage railroads to turn over all their intercity passenger service to Amtrak. It was hoped that Amtrak would then "revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking, particularly with new equipment or advanced vehicles." *Id.* at 1-2.

Achievement of Congress' objectives plainly requires compliance with the provisions of the Amtrak Act, and judicial review of Amtrak's actions is necessary if compli-

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[12] Hearings on H.R. 12084 etc., Before Subcomittee on Transportation & Aeronautics, House Committee on Interstate & Foreign Commerce, 91st Cong., 1st Sess., at 307 (1969). *See, e.g., Chicago & Eastern Ill. R. Co. Discontinuance of Trains*, 331 I.C.C. 447 (1968), *appeal dismissed, sub nom. City of Chicago* v. *United States*, N.D. Ill., 294 F.Supp. 1103, *reversed & remanded to District Court*, 396 U.S. 162 (1969), *vacated & remanded to ICC*, N.D. Ill., 312 F.Supp. 442, *reversed & remanded to District Court*, 400 U.S. 8 (1970); *Chicago & Eastern Ill. R. Co. Discontinuance of Trains*, 333 I.C.C. 626 (1968), *reversed & remanded*, N.D. Ill., 308 F.Supp. 645 (1969), *prob. jurisdiction noted*, 398 U.S. 957 (1970), *judgment vacated & case remanded to District Court with directions to remand to ICC*, 400 U.S. 987 (1971).

ance is to be assured. Allowing parties other than the Attorney General and labor to contest violations of the Act is not only fully consistent with, but is also necessary to achieve, this objective.[13] As the Supreme Court noted on another occasion when it was confronted with a statute that provided for review at the behest of the Attorney General without expressly providing for or barring review by other parties:

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. * * * The Attorney General has a limited staff and often might be unable to uncover quickly [violations of the Act]. * * *"

The guarantees of the legislation

> "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement * * *."

Allen v. *State Board of Elections, supra,* 393 U.S. at 556-

[13] It is important to note that, even though allowing suits by parties other than the Attorney General and employees will doubtless result in increased litigation, such litigation will not burden the railroads as much as litigation under pre-Amtrak procedure. The major problem with pre-Amtrak procedure was not the presence of litigation, but the fact that litigation involved, in the case of the ICC, determining the nebulous question of whether the service "is required by public convenience and necessity and will not unduly burden interstate or foreign commerce * * *." 49 U.S.C. § 13a(1) (1970). Resolution of this issue required numerous public hearings at various sites along a given train's route and analysis of complex corporate financial records. It is doubtful that issues arising under the Amtrak Act will involve resolution of such difficult factual issues or will entail the same amount of time such fact-finding consumes. For example, in the present case the facts are undisputed and the sole question is the legal issue of whether the Act permits Amtrak to contract with a subsidiary without contracting with its parent.

557. (Footnotes omitted.) The Attorney General's action in the case which is a companion on appeal to the instant case supports the Court's observations. After the District Court's decision to deny review for lack of standing, a member of Congress sent a letter to the Attorney General asking that he enter the litigation to remove procedural obstacles to adjudication on the merits. In refusing to do so, the Attorney General expressed the belief that he had no power under the Amtrak Act "to sue for a construction of the Act or to enjoin a purely technical violation." He maintained that his only authority was to bring suits "to protect and enhance the legislative purpose."[14] Indeed, appellees in this case have been unable to refer us to a single instance in which the Attorney General has either institgated or participated in litigation under the Amtrak Act, except for a few cases brought by other parties in which he intervened solely to support the defense that parties other than labor and the Attorney General did not have standing to sue. *Cf. Allen v. State Board of Elections, supra,* 393 U.S. at 556 n.22. To rely on the Attorney General as the sole source of litigation under the Act, as he would be in cases where labor's interests were not adversely affected, is thus to rest enforcement of the entire regulatory scheme on the Attorney General's virtually unreviewable[15] distinction between a mere "technical" violation and one that seriously interferes with the legislative purpose.

Absent some express and definite indication that it intended such a result, we find it difficult to believe that Congress would have hung a program as important as this by

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[14] Letter from Assistant Attorney General L. Patrick Gray, III to Congressman John Slack, Nov. 19, 1971, in appellant's Reply to Supplemental Memorandum.

[15] *See Powell* v. *Katzenbach,* 123 U.S.App.D.C. 250, 359 F.2d 234 (1965), *cert. denied,* 384 U.S. 906 (1966).

such a thin thread. We think such a result is neither compelled by the language of the statute, reasonably to be implied from the legislative history, nor conducive to achievement of the Act's laudable purpose of revitalizing the nation's intercity rail passenger trains. We therefore hold that parties other than the Attorney General, employees and employee representatives who are injured and aggrieved by actions of Amtrak or railroads in violation of the Amtrak Act have standing under that Act to seek injunctions against such actions in federal court.

III

Amtrak suggests that the real issue in this case is not standing, but rather the jurisdiction of the District Court. Focusing on the jurisdictional nature of Section 307, Amtrak argues that by expressly giving the District Court jurisdiction in cases brought by the Attorney General, employees or their representatives Congress intended to deprive the District Court of jurisdiction over suits brought by all other parties. But even were we to accept Amtrak's characterization of the issue presented, we would be unable to agree with its conclusion.

Jurisdiction of the District Court need not rest on Section 307. Appellant's complaint alleged jurisdiction on the basis of 28 U.S.C. § 1337 (1970) which provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Appellees' answer to Section 1337 jurisdiction is the Supreme Court's decision in *Switchmen's Union* v. *National Mediation Board, supra.* In that case the Supreme Court held that the general grant of jurisdiction in Section 1337 could not be invoked to sustain jurisdiction to review decisions of the National Mediation Board certifying a representative for collective bargaining, even though such a case admittedly seemed to

meet the requirements of Section 1337. *Switchmen's Union* is cited in the Court's opinion in *Barlow* v. *Collins, supra,* as authority for the proposition that "[a] clear command of the statute will preclude [judicial] review; and such a command of the statute may be inferred from its purpose." 397 U.S. at 167.

We think *Switchmen's Union* is obviously distinguishable from our case on several significant grounds. First, the Court admitted in that case that "[i]f the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 320 U.S. at 300. It found that the right of collective bargaining involved in that case was being protected without judicial review since the Mediation Board was determining the appropriate craft or class in which an election should be held. In other words, in that case the Mediation Board was already acting as a neutral body resolving disputes between labor and management or between competing labor groups. In sharp contrast, in our case no neutral administrative body had resolved a dispute between the antagonists—Amtrak and the railroads on the one hand and railroad passengers on the other. Amtrak has simply made a determination about the meaning of its own enabling statute. In this situation we are unable to conclude, as the Supreme Court concluded in *Switchmen's Union,* that there is considerable question as to whether judicial review would strengthen the rights protected by the legislation. *Id.* at 301.

It is also important to note that the finding of a command of the statute to preclude judicial review in *Switchmen's Union* was based on the entire history of Congress' treatment of railway labor problems. As the Court emphasized, Congress intentionally left large areas of the field

"in the realm of conciliation, mediation, and arbitration." *Id.* at 302. To create a new judicially enforceable right in this kind of situation would have been contrary to this long history. In our case, on the other hand, the history of railroad discontinuances indicates that until now administrative and judicial remedies were available at the behest of passengers. As is discussed more fully in our opinion in No. 71-1321, *infra*, prior to passage of the Amtrak Act railroads had to seek approval of their train discontinuances before either the state regulatory commissions or the ICC. Passenger groups and other affected parties were allowed to intervene and argue their cases in these forums.[16] We cannot help but believe that if Congress had wanted to take away these rights it would have done so in a more explicit fashion. Thus for the same reasons that we found no congressional intent in Section 307 to overcome the strong presumption of standing in favor of persons intended to be protected by legislation, we now find no congressional intent to overcome the general jurisdictional grant in Section 1337.

Appellees' final challenge to Section 1337 jurisdiction is to note that Section 1337 merely permits jurisdiction; it does not create a cause of action. *See Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951). The question then becomes, can a private right of action be implied under the Amtrak Act? We think there is ample precedent for implying such a private cause of action. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood, supra*, 327 U.S. at 684. When Congress seeks to protect a group such as railroad passengers, we may reasonably imply, absent express and definite indications to the contrary, that Congress intended

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[16] *See* 49 C.F.R. § 1122.4(d) (Oct. 1, 1972).

this group to have judicial relief to achieve the protection Congress intended. *See J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431-432 (1964). It is argued that the principle should not apply because railroad passengers are merely indirect beneficiaries of the Amtrak Act. We most heartily disagree. As indicated earlier, the congressional statement of purpose makes clear that the main function of the Amtrak Act was to preserve and improve train service. The object of the legislation was not just trains, but the people who ride them.

The private civil action, involving injured individuals acting as private Attorneys General, is becoming an accepted method of policy enforcement. *See Gomez* v. *Florida State Employment Service*, 5 Cir., 417 F.2d 569 (1969). *See also* Note, *Implying Civil Remedies From Federal Regulatory Statutes, supra.* Not only is it an accepted method, but it is one that the courts have an interest in encouraging. The judicial process works best when those with "a direct stake in the outcome" participate. *Sierra Club* v. *Morton, supra*, 405 U.S. at 740. It is important that cases be brought by those with "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues • • •." *Baker* v. *Carr, supra*, 369 U.S. at 204. Courts have supported these policies by recognizing private rights of action in a wide variety of situations and refusing to recognize those actions only in those cases where such was the express intent of Congress, *see, e.g., Powell* v. *Washington Post Co.*, 105 U.S.App.D.C. 374, 267 F.2d 651, *cert. denied*, 360 U.S. 930 (1959), or where private actions are inconsistent with other important policies such as exhaustion of administrative remedies, *see, e.g., Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra; B. F. Goodrich Co.* v. *Northwest Industries, Inc.*, 3 Cir., 424 F.2d 1349, *cert. denied*, 400 U.S. 822 (1970). Neither of these factors is present in the case of the Amtrak Act. We there-

fore conclude that a complaint alleging a violation of the Amtrak Act states a cause of action arising under an Act of Congress regulating commerce and thus may be litigated in federal district court under Section 1337.

Reversed and remanded.

No. 72-1321

On April 1, 1971, appellee Baltimore & Ohio Railroad Company (B & O) filed a notice with the ICC stating that it would discontinue six of its trains effective May 1, 1971. Four of the trains operate between the District of Columbia and Cumberland, Maryland. The other two operate between the District and Baltimore. The notice was filed pursuant to Section 401(a)(1) of the Amtrak Act, 45 U.S.C. § 561(a)(1). That section provides that a railroad which has entered into a contract with Amtrak "shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service • • •" provided that the railroad give notice of the discontinuance. Appellant Potomac Passengers Association, a group of rail commuters in the Washington, D.C. area, brought this action to obtain a declaration that the trains provided "commuter" rather than "intercity" service and are thus exempt from discontinuance under the Amtrak Act. In addition, appellant sought an injunction against the discontinuances on the ground that they violated the Amtrak Act. The District Court, accepting without comment appellant's characterization of the lawsuit as one for a violation of the Amtrak Act, held that appellant did not have standing to sue under Section 307 of the Act and dismissed the complaint. *See Congress of Railway Unions* v. *Hodgson, supra,* 326 F.Supp. at 79-80.

Were we to accept this characterization of the lawsuit, the case would present the same issue as that in No. 72-1546, *supra,* and we would reverse and remand for a hear-

ing on the merits for the same reasons as control that case. It now appears, however, that this characterization is improper. While this lawsuit admittedly seeks a judicial interpretation of a provision of the Amtrak Act, it cannot properly be characterized as a suit for a violation of the Amtrak Act, and it is therefore not controlled by the standing requirement of Section 307. Instead this suit, properly understood, seeks a declaratory judgment that the trains discontinued by B & O provide "commuter" service and are therefore outside the coverage of the Amtrak Act—that is, that their discontinuance is neither authorized nor barred by the Act but is subject to the pre-existing jurisdiction of state regulatory agencies and the ICC. We hold that the District Court has jurisdiction to hear the merits of this declaratory judgment action and therefore reverse and remand.

To understand the posture of this case, it is helpful to summarize briefly the history of the law governing passenger train discontinuances. Prior to 1958 discontinuances of all passenger trains, without distinction as to whether they provided intercity or commuter service, required the approval of the appropriate regulatory agency in each of the states in which the train operated. *See United States* v. *City of Chicago*, 400 U.S. 8, 11 n.3 (1970). This procedure had many faults which Congress attempted to cure by enacting Section 13a of the Interstate Commerce Act, 49 U.S.C. § 13a. This section gave the ICC the power to approve train discontinuances, again without distinction as to the kind of service—intercity or commuter—provided. The ICC's jurisdiction was not exclusive, however. If a railroad so desired, it could continue to seek authorization for a discontinuance from the appropriate state regulatory agencies. At its option, or after the state commission refused to approve the discontinuance, a railroad seeking to discontinue an interstate train could bypass the state regulatory agencies by filing a notice of proposed discon-

tinuance with the ICC. Unless ordered by the Commission to continue the service in question, the railroad could, 30 days after filing its notice, discontinue the service notwithstanding the laws or constitution of any state or the decision or order of, or pendency of any proceeding before, any court or state authority to the contrary. That is, the jurisdiction of the state agencies was exclusive until a notice of discontinuance was filed with the ICC.[17] Once such a notice was filed, the ICC had exclusive jurisdiction.[18]

The Amtrak Act in no way affected this procedure as it applies to passenger trains providing commuter service. The Act applies solely to "intercity rail passenger service," defined in the Act as "all rail passenger service other than (A) commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations * * *." 45 U.S.C. § 502 (5). Without going into the more complicated aspects of the Act, it basically permits railroads that have signed contracts with Amtrak to discontinue their intercity rail passenger service, and it bars railroads that have not

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[17] *See generally Kennedy* v. *Baltimore & Ohio R. Co.*, 342 I.C.C. 19, 21 (1972): "It is well settled that section 13a(1) is a permissive section of the act and does not impose any requirement upon a carrier to file a notice of proposed discontinuance. The first sentence of the statute states that a carrier '*may*, but *shall not be required to*, file with the Commission * * *.' [Emphasis supplied.] If a carrier does not choose to file with the Commission, jurisdiction is retained by the States."

[18] *See Pennsylvania R. Co.* v. *Sharfsin*, M.D. Pa., 240 F. Supp. 233, 235, *vacated & remanded on other grounds, sub nom. Pennsylvania Public Utility Comm'n* v. *Pennsylvania R. Co.*, 382 U.S. 281 (1965), *affirmed*, 3 Cir., 369 F.2d 276 (1966), *cert. denied*, 386 U.S. 982 (1967); *Chicago & Eastern Ill. R. Co.* v. *United States*, *supra* note 12, 308 F.Supp. at 648.

signed contracts with Amtrak from discontinuing such service prior to 1975. All references in the Act are to *intercity* rail passenger service;[19] the Act neither authorizes nor bars discontinuance of trains providing commuter and other short-haul service. It simply has no effect on such trains. This is evident not only from the language of the Act but also from the legislative history.[20] Therefore, a railroad desiring to discontinue a train providing commuter and other short-haul service must seek approval from either the regulatory agencies of the states through which the train passes or from the ICC, just as it did prior to passage of the Amtrak Act.[21]

B & O has not sought such approval in this instance because it believes that the trains it discontinued provide in-

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[19] A prior version of the bill referred in one section simply to "passenger service." The mistake was quickly brought to the attention of the Committee and the words "intercity rail" inserted before "passenger service" "to avoid the application of this section to commuter service." Supplemental Hearings, *supra* note 3, at 110.

[20] "The bill will apply only to intercity passenger trains and would not apply to service which is primarily commuter service." 116 CONG REC. (Part 11) 14164 (1970). "[T]his legislation * * * refers to intercity transportation of passengers by rail. It does not include commuter service. Of relevance here is the fact that the Senate has approved a bill specifically allocating $3 billion for commuter and other urban transportation. * * * Basically, commuter service is excluded from the bill * * *." *Id.* at 14178. *See also* note 19 *supra.*

[21] The ICC has recognized its continued jurisdiction over commuter trains if a railroad invokes that jurisdiction by filing a notice of discontinuance with the Commision. *See Chicago S. Shore & S. Bend R. Restructuring of Pass. Serv.*, 342 I.C.C. 154, 179-180 (1972). *See also Penn Central Transp. Co. Discontin. or Change in Serv.*, 338 I.C.C. 318, 320 (1971). *Cf. Kennedy* v. *Baltimore & Ohio R. Co.*, *supra* note 17, 342 *I.C.C.* at 21.

tercity rail passenger service, not commuter and other short-haul service. It therefore believes that the discontinuances were authorized under the Amtrak Act. Potomac Passengers Association has requested both a declaration that these trains provide "commuter and other short-haul service" and an injunction against the discontinuances. The issue, then, is whether the District Court has jurisdiction and power to grant either remedy.

At the outset, it is evident that Section 307 of the Amtrak Act does not affect the result. That section, by its own terms, applies only to suits seeking equitable relief necessary to prevent or terminate (1) violations of the Act, (2) conduct that is inconsistent with the policies and purposes of the Act or obstructs or interferes with activities authorized by the Act, (3) failures to exercise responsibilities imposed by the Act, and (4) threats of such actions. Discontinuance of a commuter train, however, is not a violation of the Act, is not inconsistent with the policies of the Act, and does not interfere with activities authorized by the Act. The Act has nothing to do with commuter trains. If the trains at issue provide intercity rail passenger service, as B & O contends, there is no question but that their discontinuance is lawful under the Act.[22] If the trains provide commuter and other short-haul service, as appellant alleges, there is no question but that their discontinuance is unlawful—not under the Amtrak Act, but under the laws of the states through which they pass, since approval has admittedly not been sought from either the state regulatory

[22] The complaint also alleged that the discontinuances were illegal because the discontinuance notices were posted prior to the signing of the contract with Amtrak, even though the discontinuances did not go into effect until after the signing of the contract. Appellant has not pursued this issue on appeal. If the issue is pursued further, of course, nothing we say here should be read as a reflection of our views on the merits of that issue.

agencies or the ICC.[23] Section 307, therefore, has nothing to do with this case, as is evident from subsection (b):

> "Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter."

The foregoing discussion also indicates that the District Court has no power to enjoin discontinuance of these trains. If they provide intercity rail passenger service, their discontinuance is concededly lawful. If they provide commuter service, since no notice of discontinuance has yet invoked the jurisdiction of the ICC, their discontinuance is a violation of state, not federal, law.[24] The District Court has no power to issue an injunction enforcing state law in this instance, for to do so would usurp the primary jurisdiction of the state regulatory agencies and would circumvent the procedure established by the state to enforce its own laws.[25] Should B & O seek approval of the

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[23] "The [Public Service] Commission [of the State of Maryland] may require the continuance of any service rendered to the public by any public service company under any franchise, right, or permit, after its expiration date, if any; and no service under a franchise, right or permit shall be discontinued or abandoned without the consent of the Commission, which shall be granted if the Commission finds that the present or future public convenience and necessity permits such discontinuance or abandonment." 7 ANN. CODE OF MD. Art. 78, § 72 (1969).

"No railroad or other public utility shall discontinue any regular passenger train, or other public service facility, or change any regular passenger train schedule or timetable, without first obtaining authority from the [Public Service Commission of the State of West Virginia] so to do * * *." 9 W. VA. CODE ANN. § 24-3-1 (1971).

[24] *See Kennedy* v. *Baltimore & Ohio R. Co., supra* note 17. *See also* note 1 *supra.*

[25] *See, e.g.,* 7 ANN. CODE OF MD. Art. 78, § 99 (1969): "When

discontinuances from the ICC, an injunction would be inconsistent with the ICC's primary jurisdiction.[26]

It is equally clear, however, that the District Court has jurisdiction to render a declaratory judgment as to whether these trains provide intercity rail passenger service or commuter and other short-haul service within the meaning of the statute. That is, the court may decide whether discontinuance of these trains is still subject to the jurisdic-

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the [Public Service] Commission [of the State of Maryland] is of the opinion that any public service company subject to its jurisdiction is violating or is about to violate any of the provisions of this article, it shall cause action to be brought in its name for mandamus or injunction * * *."

[26] Once a notice of discontinuance is filed with the ICC, that agency can exercise administrative discretion and expertise in several ways. First, the ICC has the option of investigating the discontinuance or simply letting the discontinuance take effect. *See City of Chicago* v. *United States, supra* note 12, 396 U.S. at 165. Even if the ICC does enter into an investigation, the decision whether or not to enjoin the discontinuance pending the outcome of the investigation is also within the discretion of the ICC. "Upon the institution of such investigation, the Commission * * * *may* require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective." 49 U.S.C. § 13a(1). (Emphasis added.) Finally, of course, the ICC uses its expertise in deciding whether to approve the discontinuance or whether continued operation of the train "is required by public convenience and necessity and will not unduly burden interstate or foreign commerce * * *." *Ibid.*

Where matters such as these are entrusted by statute to an administrative agency, the doctrine of primary jurisdiction requires that the parties not circumvent the agency by means of a court action. *See Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). *See also Trans-Pacific Airlines* v. *Hawaiian Airlines*, 9 Cir., 174 F.2d 63 (1949).

tion of the state regulatory agencies and the ICC or whether they are exempted from such jurisdiction by the Amtrak Act. The sole issue in this case is interpretation of a federal law regulating the railroads, and the case is therefore one meeting the jurisdictional requirements of 28 U.S.C. § 1337 which grants jurisdiction of civil actions arising under any Act of Congress regulating commerce. The power to construe the Amtrak Act and declare the nature of these trains is subsumed within the power granted by the Declaratory Judgment Act, 28 U.S.C. § 2201 (1970). We therefore reverse and remand the case to the District Court with instructions to adjudicate the merits of the controversy and issue appropriate declaratory relief.[27]

So ordered.

---

[27] In its complaint appellant requested that the District Court refer the intercity-commuter issue to the ICC, a procedure that some other courts have used. *See, e.g., Illinois Commerce Comm'n* v. *Chicago & Eastern Ill. R. Co.*, 400 U.S. 987 (1971); *In re Penn Central Transportation Co.*, E.D. Pa., 329 F.Supp. 572 (1971). *See also In re Penn Central Transportation Co.*, 3 Cir., 457 F.2d 381 (1972). The ICC has already decided several such referral cases. *See, e.g., Penn Central Transp. Co. Discontin. or Change in Serv., supra* note 21; *Penn Central Transp. Co.—Status of Pass. Serv.*, 338 I.C.C. 621 (1971); *same*, 338 I.C.C. 660 (1971); *same*, 338 I.C.C. 690 (1971); *Chicago & Eastern Ill. R. Co. Discontinuance of Trains*, 338 I.C.C. 714 (1971). We intimate no views at the present time as to either the propriety of such a referral in the instant case or the validity of the standards developed by the ICC in the above cited cases.

Filed Jan. 5, 1973

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972
Civil Action 842-71

No. 71-1321

POTOMAC PASSENGERS ASSOCIATION, *Appellant*

v.

CHESAPEAKE AND OHIO RAILROAD COMPANY AND BALTIMORE AND OHIO RAILROAD COMPANY

No. 71-1546

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Appellant*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY AND NATIONAL RAILROAD PASSENGER CORPORATION

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Bazelon, Chief Judge, Wright and Wilkey, Circuit Judges.

Judgment

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On considertion of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby reversed and these cases are hereby remanded to

the District Court for the reasons set forth in the opinion of this Court filed herein this date.

Per Curiam

Dated: January 5, 1973
Opinion by Circuit Judge Wright

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

No. 71-1546

Civil Action 831-71

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Appellant*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY and NATIONAL RAILROAD PASSENGER CORPORATION

Before: Bazelon, Chief Judge, and Wright and Wilkey, Circuit Judges

Order

On consideration of appellees' motion to extend the stay of the mandate to March 22, 1973, it is

ORDERED by the Court that the motion is granted and the Clerk is directed to stay the issuance of this Court's mandate until March 22, 1973.

The stay granted herein shall be subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 831-71

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Plaintiff*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, NATIONAL RAILROAD PASSENGER CORPORATION, *Defendant.*

Order

This case having been heard on motions for a temporary restraining order and a temporary injunction, and it appearing to the Court (1) that the plaintiff does not having standing to maintain this action under Section 307 of the Rail Passenger Act of 1970 (P.L. 91-518), and (2) that in any event plaintiff has not demonstrated a substantial likelihood of success on the merits of its claim, it is therefore

ORDERED, that the motions be and they are hereby denied, and the cause is hereby dismissed.

/s/ JOHN H. PRATT, J.

May 5, 1971

No objection as to form:
/s/ GORDON P. MACDOUGALL
Counsel for Plaintiff

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
ALBANY, NEW YORK 12201

February 21, 1973

James T. Foley
Chief Judge

JFD:ls
77-62-1298

Mr. James F. Dausch
Attorney
Office of Special Litigation Counsel
Civil Division
United States Department of Justice
Washington, D. C. 20530

Re: Schuler, et al v. National Railroad Passenger Corporation, et al — 72-CV-211 (ND NY)

Dear Mr. Dausch:

Receipt is hereby acknowledged of your letter of February 16, 1973, confirming our telephone conversation of February 14, 1973.

In our conversation, I agreed with your suggestion in behalf of all parties in the above action that the best course to follow was to suspend briefing and withhold decision on the issues pending before me in the above action inasmuch as Amtrak intends to petition for certiorari in regard to identical issues decided by the Circuit Court of Appeals, District of Columbia, in the Central of Georgia Railway and National Railroad Passenger Corporation case, decided January 5, 1973.

I assume from your letter, with copies to the other attorneys, that they agree for all parties in the action before me

to the course of action outlined above and this letter approves it accordingly.

Sincerely,

/s/ JAMES T. FOLEY
Chief Judge, U. S. District Court
Northern District of New York

cc: George Miller, Esq.
John C. McTiernan, Esq.
Donald A. Brinkworth, Esq.
James E. Cullum, Esq.
Joseph R. Scully, Clerk

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530

September 6, 1972

(Seal)

Address Reply to the
Division Indicated
and Refer to Initials and Number
EGL:IG:JFD:cjc

William O. Bittman, Esquire
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Re: Potomac Passengers Association v. Chesapeake and Ohio Railway Company, et al., C.A.D.C. No. 71-1321; N.A.R.P. v. Central of Georgia Railway Company, et al., C.A.D.C. No. 71-1546.

Dear Mr. Bittman:

You have informed us that the above-named cases will be argued to the United States Court of Appeals for the District of Columbia Circuit on Friday, September 8, 1972. You have also furnished us copies of Appellants' brief, reply brief, and supplemental brief. In the latter document, Appellants represent to the Court that the Attorney General has "allowed private parties to proceed on their own" to seek enforcement of the policies and provisions of the Rail Passenger Service Act of 1970, 45 U.S.C. 501 et seq. (the Act), by means of private suits in the district courts. It appears that Appellants misapprehend the position of the Attorney General. It is our position that, in non-labor agreement cases, Section 307 of the Act, 45 U.S.C. 547, reserves to the Attorney General the exclusive right to sue Amtrak or any railroad for actual or threatened violation of the policies and provisions of the Act. This position coincides with Judge Corcoran's construction of Section

307 of the Act in his opinion below in the consolidated cases reported as *Congress of Railway Unions* v. *Hodgson*, 326 F. Supp. 68 (D.D.C., 1971), in which this Department participated. Moreover, in three cases presently pending, we have advanced this position against private parties who have asserted a private right to sue under Section 307 in a non-labor agreement case: *Parker* v. *National Railroad Passenger Corporation, et al.*, N.D. N.Y., Civil No. 72-CV-211; *City of New York* v. *N.R.P.C., et al.*, S.D. N.Y., Civ. No. 72-1988; and *Commonwealth of Pennsylvania, et al.* v. *Baker, et al.*, E.D. Pa., Civil No. 71-2301.

If appropriate, you are authorized to bring the contents of this letter to the attention of the Court of Appeals during oral argument on September 8, 1972.

Yours very truly,

E. GREY LEWIS
Acting Assistant Attorney General
Civil Division

By /s/ IRWIN GOLDBLOOM
Irwin Goldbloom
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,

Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF RAILROAD PASSENGERS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is not yet reported. The order of the district court (Pet.

App. 39a) is unreported and was rendered without opinion.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1973 (Pet. App. 36a-37a), and the petition for a writ of certiorari was filed March 21, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether injured and aggrieved parties may maintain actions to enjoin violations of the Amtrak Act, or whether Section 307 of the Act, 45 U.S.C. 547, bars suits by all parties other than the Attorney General of the United States, employees and employee representatives.

STATEMENT

This litigation involves an attempt by National Railroad Passenger Corporation ("Amtrak"), joined by the Southern Railway Company ("Southern") and its 99-percent subsidiary, Central of Georgia Railway Company ("Central"), to immunize themselves from injunctive actions for threatened violations of the Amtrak statute.

The action was instituted in the district court by National Association of Railroad Passengers, respondent here, to restrain the discontinuance of Central's trains on the ground, inter alia, that Central was a part of Southern

---

[1] The case below was consolidated with the appeal in *Potomac Passengers Association v. Chesapeake & Ohio Railway Co., et al.*, opinion of the district court sub nom. *Congress of Railway Unions v. Hodgson*, 326 F. Supp. 68 (D.C. D.C. 1971).

within the meaning of section 401(a)(1) of the Amtrak Act, 45 U.S.C. 561(a)(1). That section requires that a railroad must contract with Amtrak for its entire responsibility for the provision of intercity rail passenger service, in order to discontinue any passenger trains. Central contracted with Amtrak, but Southern did not contract with Amtrak.

The district court dismissed the action for lack of standing to sue. The court of appeals reversed. The court of appeals held, in a comprehensive and thorough opinion, that injured persons may maintain actions for injunctive relief. Section 307 of the Amtrak Statute does not bar such actions. The court based its opinion not only upon a three-part standard governing "standing to sue", but also under the doctrines of "jurisdiction", "reviewability", and "private causes of action".

The case below was consolidated with *Potomac Passengers Assn v. Chesapeake & Ohio Ry. Co., et al.*, supra at fn. 1, which involved the question whether a federal district court has jurisdiction to determine whether a specific train provides "intercity rail passenger service" or "commuter and other short-haul service" within the meaning of the Amtrak Act. The court held that section 307 of the Amtrak statute is not in issue because this question is not whether the Amtrak law has been violated. Jurisdiction of the district court was sustained under the commerce power and the Declaratory Judgment Act, 28 U.S.C. 1337, 2201. That ruling is not challenged here.

ARGUMENT

The decision below is correct and no issue warranting plenary review is presented. We find it difficult to improve upon the exhaustive opinion of the court below.

1. The court of appeals correctly found an absence of any Congressional purpose or intent to curtail conventional judicial remedies, or to lodge injunctive relief *only* in the hands of the Attorney General and railway labor. Another court, in another circuit, has reached the same conclusion. *Wood v. National Railroad Passenger Corp.*, 341 F. Supp. 908 (D. Conn. 1972). Moreover, contrary to petitioners' contention, the construction of section 307 of the Amtrak statute is not even a threshold question in any important case;[2] and there is nothing inconsistent in *Quincy College & Sem. Corp. v. Burlington Northern, Inc.*, 328 F. Supp. 808 (N.D. Ill. 1971), aff'd 405 U.S. 906 (1972).[3] Petitioners are grasping at straws in their attempt to find a conflict of authority sufficient to warrant plenary review by this Court.

The notion that Congress was aware that enactment of the Amtrak law statute would result in the discontinuance of many trains, lends no support to a view that section 307 was intended to preclude judicial action to enjoin unlawful train discontinuances. Congressional concern for lawful train discontinuances, also extends to the prevention of unlawful train discontinuances.

---

[2] The five other cases cited (Pet. pp. 9-10, fn. 24) are comprised of two minor and virtually inactive cases in the Northern and Southern Districts of New York; two companion cases, involving identical trains in the Eastern District of Pennsylvania, which deal solely with the "intercity" versus "commuter" question, reported at 338 I.C.C. 621 and 338 I.C.C. 690; and one case in the Northern District of Illinois, dealing solely with the "intercity" versus "commuter" question.

[3] Reference to the decision of a single judge in *Miltenberger v. Chesapeake & Ohio Railway Co.*, 450 F.2d 971, 974-5 (4th Cir. 1971), is wholly misplaced. The decision below acknowledges 45 U.S.C. 541. (Pet. App. pp. 5a-6a, 7a-8a)

2. The statutory language does not preclude suits by persons other than the Attorney General or railway labor. Petitioners point to the so-called title of Section 307 as, "Jurisdiction of the district courts of the United States to Impose Sanctions", and suggest that such a specific jurisdictional grant . . . must supersede the general jurisdictional grant of 28 U.S.C. 1337." (Pet. p. 2, 17) However, the cited title was given by the West Publishing Company, rather than by the Congress. The title of Section 307, as enacted by the Congress, only reads "Sanctions". 84 Stat. 1333. 1970 U.S. Code Cong. & Adm. News 1552. Moreover, as the court below observed, Congress intended that railroad passengers would have a right of action (Pet. App. pp. 26a-27a):

> "When Congress seeks to protect a group such as railroad passengers, we may reasonably imply, absent express and definite indications to the contrary, that Congress intended this group to have judicial relief to achieve the protection Congress intended. *See J.I. Case Co. v. Borak*, 377 U.S. 426, 431-32 (1964). It is argued that the principal should not apply because railroad passengers are merely indirect beneficiaries of the Amtrak Act. We most heartily disagree. As indicated earlier, the congressional statement of purpose makes clear that the main function of the Amtrak Act was to preserve and improve train service. The object of the legislation was not just trains, but the people who ride them."

3. Petitioners fears that a "wave of injunctive actions" would "cripple", "emasculate", and "threaten substantial if not fatal interference" with Amtrak's program, are baseless. (Pet. pp. 7a-10a) Amtrak has nothing to fear if it stays within the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent,
National Association of
Railroad Passengers

April 1973

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
APR 24 1973
MICHAEL RODAK, JR., CLERK

No. 72-1289

In the Supreme Court of the United States

OCTOBER TERM, 1972

NATIONAL RAILROAD PASSENGER CORPORATION, CENTRAL OF GEORGIA RAILWAY COMPANY, AND SOUTHERN RAILWAY COMPANY, PETITIONERS

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

ERWIN N. GRISWOLD,
Solicitor General,
HARLINGTON WOOD, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION, CENTRAL OF GEORGIA RAILWAY COMPANY, AND SOUTHERN RAILWAY COMPANY, PETITIONERS

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

The United States believes that the petition for a writ of certiorari raises an important issue of statutory construction which may have a substantial effect on the efficient operation of the National Railroad Passenger Corporation (Amtrak), the entity which Congress created for the operation of intercity railroad passenger service.

Section 370 of the Amtrak Act, 45 U.S.C. 547, gives the district court jurisdiction "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable re-

lief as may be necessary" to correct any statutory violations by Amtrak. The Court of Appeals for the District of Columbia Circuit held that despite this carefully limited authorizing provision, other persons could sue Amtrak to enjoin violation of the Act. The question is whether the Act authorizes such persons to maintain such suits. Since the United States believes that permitting such suits is not only inconsistent with the statutory plan but would significantly adversely affect Amtrak, it urges this Court to grant the petition.

INTEREST OF THE UNITED STATES

Amtrak was created by Congress to operate intercity rail passenger service. The interest of the United States in the efficient and economical operation of Amtrak is reflected in the congressional findings and declaration of purpose in the Amtrak Act (45 U.S.C. 501):

> The Congress finds that modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country; that rail passenger service can help to end the congestion on our highways and the overcrowding of airways and airports; that the traveler in America should to the maximum extent feasible have freedom to choose the mode of travel most convenient to his needs; that to achieve these goals requires the designation of a basic national rail passenger system and the establishment of a rail passenger corporation [Amtrak] for the purpose of providing modern, efficient, intercity rail passen-

ger service; that Federal financial assistance as well as investment capital from the private sector of the economy is needed for this purpose; and that interim emergency Federal financial assistance to certain railroads may be necessary to permit the orderly transfer of railroad passenger service to a railroad passenger corporation.

The interest of the United States is further reflected in various provisions of the statute prescribing a continuing relationship between the federal government and Amtrak. The President appoints, with Senate approval, a majority (8 members) of Amtrak's board of directors (45 U.S.C. 543). Amtrak is required to submit monthly and annual operating and planning reports to the President and to the Congress (86 Stat. 228, 45 U.S.C. 548(a) and (b)). The Secretary of Transportation is required to report annually to Congress on the effectiveness of the Act in meeting the requirements of a balanced national transportation system (45 U.S.C. 548(c), as added). Finally, and most importantly, Congress provides Amtrak with money to purchase new equipment, rehabilitate old equipment, upgrade roadbed, conduct research, and perform other related functions (45 U.S.C. 601-602).

DISCUSSION

A fundamental aspect of the congressional plan in the Amtrak Act to rehabilitate intercity rail passenger service is that Amtrak be able to discontinue promptly uneconomic and unneeded passenger rail service. The Act's legislative history indicates that Congress attempted to accomplish rapidly two related goals—first, a "rational reduction of present service"; and second, the organization of the remaining service "into a cohesive system requiring a management which takes

into consideration the needs and abilities of the entire system***."[1] In order to accomplish these goals, Congress gave Amtrak considerable latitude in the initiation and discontinuance of passenger service. Amtrak may initiate or discontinue at any time any service beyond that provided in the basic transportation system designated by the Secretary of Transportation.[2] After July 1, 1973, even the minimum service required for the basic system may be discontinued under the procedure of Section 13a of the Interstate Commerce Act (45 U.S.C. 564(b)(3).[3] States and localities have the right to require Amtrak to operate service beyond the basic system only if they agree to compensate Amtrak for the loss involved in such excess service (45 U.S.C. 563(b)).

The Secretary of Transportation's 1973 Report to Congress (pp. 7, 98) recommends a limited federal subsidy for Amtrak's operating deficit. Amtrak deficits resulting from operation of uneconomic and unneeded trains must be minimized if Amtrak's limited resources are to be put to the best possible use in the permanent

---

[1]H. Rep. No. 91-1580, 91st Cong., 2d Sess., at p. 3.

[2]45 U.S.C. 563(a), 564(b)(2). The Secretary's designation of service required for the basic system is essentially a minimum of one train per day between identified end point cities. See Final Report on Basic National Rail Passenger System, submitted by John A. Volpe, Secretary of Transportation, in accordance with P.L. 91-518, January 28, 1971.

[3]The Department of Transportation has recommended to Congress that, in light of the constant federal supervision and subsidization of Amtrak, the need for approval by the Interstate Commerce Commission for discontinuance of basic system service be eliminated from the statute. Report to Congress The Rail Passenger Service Act of 1970, March 1973 ("the 1973 Report"), pp. 107-108.

improvement of the rail passenger system. The court of appeals' decision, however, is likely to frustrate that purpose.

The decision is likely to lead to a large number of lawsuits, filed by states, localitites, or private persons or associations, designed to delay or defeat Amtrak's curtailment or elimination of uneconomic or unneeded service. This is particularly likely when the only alternatives are loss of service or subsidies from local budgets for the service (45 U.S.C. 563(b)). Moreover, it is probable that stays of the discontinuance of service will be issued in many of those cases, thereby requiring Amtrak to continue the service for the duration of the litigation. The likely result of permitting such suits to be maintained, therefore, is a further drain on Amtrak's limited resources and their diversion into activities that are inconsistent with and unnecessary to the congressional plan to improve and rehabilitate intercity rail passenger service.

In view of these considerations, we submit that Congress did not intend to permit such suits to be maintained. As the petition for certiorari explains (pp. 12-16), the congressional grant of authority to the Attorney General, employees and their representatives to maintain suits to correct statutory violations reflects an intent that they alone, but not other persons, may maintain such actions. There would have been no reason for Congress to have included these limitations if the Act impliedly also permits suits by the broad range of persons who, under the court of appeals' decision, may conduct such litigation. The decision of the court of appeals is inconsistent with the legislative history of the Act, which shows that Congress imposed the limited authority to sue in Section 370 in response

to a request by the Secretary of Transportation that jurisdiction to enforce the Amtrak Act be so restricted (Pet. 15-16).

A definitive resolution of the issue by this Court is appropriate at this time. There are a number of pending cases which involve the standing issue. In some of them, *e.g., Schuler* v. *National Rail Passenger Corp.*, No. 72-CV-211 (N.D. N.Y.), and *City of New York* v. *National Rail Passenger Corp.*, No. 72-Civ. 1988 (S.D. N.Y.), local governments seek to compel Amtrak to cancel reductions in uneconomic service. In another case, *Commonwealth of Pennsylvania, et al.* v. *Baker, et al.*, No. 71-2301 (E.D. Pa.), two state authorities challenge the right of Amtrak under the Act to operate certain passenger trains between New York City and Philadelphia. Moreover, in view of the approaching substantial train discontinuances expected after July 1, 1973 (1973 Report, pp. 98-100), there is likely to be further litigation by private parties challenging Amtrak's train discontinuances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HARLINGTON WOOD, JR.,
Assistant Attorney General.

MORTON HOLLANDER,
IRWIN GOLDBLOOM,
JAMES F. DAUSCH,
Attorneys.

APRIL 1973.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION, CENTRAL OF GEORGIA RAILWAY COMPANY, and SOUTHERN RAILWAY COMPANY, *Petitioners,*

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION, CENTRAL OF GEORGIA RAILWAY COMPANY, and SOUTHERN RAILWAY COMPANY, *Petitioners,*

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

ORDER AND OPINION BELOW

The unreported order of the District Court dismissing the cause appears at page 19 of the Single Appendix (SA). The opinion of the Court of Appeals is reported at 475 F.2d 325 and appears at SA 20.

JURISDICTION

The judgment and opinion of the Court of Appeals was rendered on January 5, 1973.[1] On February 9, 1973, that court stayed the issuance of its mandate for

[1] On January 10, 1973, the opinion was amended to correct a minor error, i.e., a reference at SA 23 to "Birmingham, Georgia" was changed to "Birmingham, Alabama."

a period of thirty days, and on March 9, 1973 the stay was extended to March 22, 1973. (SA 57). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Can all passengers and other allegedly aggrieved persons maintain actions in the District Courts to enjoin supposed violations of the Rail Passenger Service Act of 1970 (the "Amtrak Act"), 45 U.S.C. § 501 *et seq.* (1970), *as amended,* (Supp. II, 1972), despite the provision in Section 307 of the Act that the District Courts shall have jurisdiction to grant such relief "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives"?

STATUTORY PROVISION INVOLVED

Section 307 of the Amtrak Act provides as follows:

> *Jurisdiction of the District Courts of the United States to Impose Sanctions.*
>
> (a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected

thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter. [45 U.S.C. § 547].

STATEMENT OF THE CASE

Proceedings Below.

This is an action to enjoin the discontinuance of certain trains previously operated by the Central of Georgia Railway Company. Central discontinued the trains under authority of the Amtrak Act after entering into a contract with the National Railroad Passenger Corporation (Amtrak) for assumption by Amtrak of Central's intercity rail passenger service responsibilities.[2] Respondent National Association of Railroad Passengers (NARP) alleges that this contract does not comply with the terms and purposes of the Amtrak Act. (Complaint, SA 8, 9). The suit was said to be brought "pursuant to 28 U.S.C. § 1331, 1337, and 45 U.S.C. 501 *et seq.*, and particularly sections 564(a) and 642 of Title 45." (SA 9).

On May 5, 1971, the United States District Court for the District of Columbia dismissed the complaint on the ground, *inter alia*, "that the plaintiff does not [have] standing to maintain this action under Section 307 of the Rail Passenger [Service] Act of 1970." (SA 19). On January 5, 1973, the Court of Appeals

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[2] The principal provisions of the Act governing discontinuances are described at pages 7-8, *infra*.

reversed and remanded the case to the District Court for an adjudication on the merits. The court concluded that standing to sue Amtrak and the defendant railroads should be determined by the same three-part test that governs standing to seek judicial review of governmental administrative actions and that the first two elements of this test—(1) whether NARP has alleged that it suffered injury in fact and (2) whether it is arguably within the zone of interests to be protected by the legislation—are satisfied in the present case. (SA 25-27).

As to the third element of the test, the Court of Appeals could see no convincing evidence that Congress intended to preclude the maintenance of lawsuits by all aggrieved parties. Although petitioners argued that the language, legislative history, and purposes of the Act clearly manifested a legislative intent to allow only the Attorney General to bring enforcement actions in cases not involving labor agreements, the court did not believe that this evidence was sufficient to overcome "the strong presumption in favor of judicial review" which the court considered applicable. (SA 28).

Finally, after completing the "standing" analysis described above, the court held that NARP's right to sue could also be sustained if the case were analyzed in terms of jurisdiction or the existence of a private cause of action.[3] (SA 43-46).

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[3] In the same opinion the Court of Appeals reversed the judgment of the District Court in *Potomac Passengers Association* v. *Chesapeake & Ohio Railway Co., et al., opinion sub nom. Congress of Railway Unions* v. *Hodgson,* 326 F. Supp. 68 (D.D.C. 1971), consolidated with this case on appeal. The court held that Section 307 was not involved in that case since the suit, properly con-

Background of the Amtrak Act.

In 1969 and 1970 both houses of Congress held hearings which indicated that the nation was faced "with the immediate threat of the complete curtailment of rail passenger service."[4] In 1929 there were approximately 20,000 passenger trains in operation in the United States; in 1969 there were 450. Ever since 1930, except for the World War II period when gasoline rationing forced many travelers off the highways, operation of passenger trains has been generally unprofitable.[5]

After World War II, resumption of automobile production, expansion of highway facilities, and the tremendous growth of air travel, all generously aided by federal financial assistance, took increasing numbers of passengers from the railroads. (S. Rep. 91-765, p. 2). By the mid 1950's the staggering losses from passenger operations were no longer sufficiently absorbed by freight business to make continued passenger service economically viable, and the railroads turned with increasing frequency to state regulatory commissions for authority to discontinue little-used passenger trains. There, according to the Senate Report,

> They met with considerable resistance; trains which clearly served no useful purpose were either

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ceived, was not one for violation of the Amtrak Act but rather an action for a declaratory judgment that certain trains were "commuter" rather than "intercity" and that their discontinuance was therefore not governed by the Amtrak Act. The correctness of that decision is not at issue here.

[4] H.R. Rep. No. 91-1580, 91st Cong., 2nd Sess. (hereafter cited as "H.R. Rep. 91-1580"), p. 2 (1970).

[5] S. Report No. 91-765, 91st Cong., 2nd Sess. (hereafter cited as "S. Rep. 91-765"), p. 2 (1970).

> required to be kept in operation or were allowed to be discontinued only after protracted administrative and judicial proceedings. [S. Rep. 91-765, p. 2].

In 1958, in an effort to reduce the losses on passenger train operations, Congress enacted Section 13a of the Interstate Commerce Act (49 U.S.C. § 13a) authorizing railroads to petition the Interstate Commerce Commission for permission to discontinue passenger trains. While Section 13a temporarily eased the financial drain on the railroads, the number of passenger trains continued to decline due, in part, to the interstate highway program (initiated in 1956), the jet aircraft (1958), the Post Office's conversion from enroute sorting of mail in railway cars to stationary sorting at section centers (1967), and the deterioration of passenger services on some railroads. (S. Rep. 91-765, p. 2).

By 1970 Congress had concluded that rail passenger service was an essential component of a balanced national transportation system, particularly in light of increasing congestion of the highways and airways and consequent increases in fatalities and pollution. (H.R. Rep. 91-1580, p. 2; S. Rep. 91-765, pp. 2-3). It had also concluded that, while the argument about the causes of passenger train declines could go on indefinitely,

> if it continues it will be an argument only over the past and the last passenger train will be in a museum. Positive action and a completely new direction is required—and urgently required—now. [H.R. Rep. 91-1580, p. 3].

To save any passenger trains at all, Congress found, would require a paring of uneconomic routes since "a large number of them hold no promise for financial

success in the foreseeable future." It would also require the establishment of a quasi-public National Railroad Passenger Corporation which could manage rail passenger operations on a unified, national basis and take innovative and decisive action to improve such operations and revitalize rail passenger train service throughout the United States. (H.R. Rep. 91-1580, pp. 1, 3).

STRUCTURE OF THE ACT.

On October 14, 1970, Congress enacted the Rail Passenger Service Act of 1970. The Act authorized creation (45 U.S.C. § 541) of a National Railroad Passenger Corporation ("Amtrak") to provide intercity rail passenger service between points designated by the Secretary of Transportation as components of a "basic national system" of intercity rail service. (45 U.S.C. §§ 501, 521). Though subsidized by the federal treasury and vested with a broad mandate to reorganize intercity rail service (45 U.S.C. § 545), Amtrak is not "an agency or establishment of the United States Government." Amtrak is to act boldly and decisively, "employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity passenger transportation requirements." (45 U.S.C § 541).

Under the Act, Amtrak was authorized to contract with any railroad, on or before May 1, 1971, and between March 1, 1973 and January 1, 1975, to relieve that railroad of its entire responsibility for provision of intercity rail passenger service. Upon entering into such a contract, the railroad could discontinue any intercity train simply by filing with the Interstate Commerce Commission a thirty-day notice of intent to

discontinue. (45 U.S.C. § 561(a)(1).[6] Railroads which did not enter such contracts are forbidden to discontinue any intercity passenger trains before January 1, 1975, and can do so thereafter only by following the discontinuance procedures in Section 13a of the Interstate Commerce Act. (45 U.S.C. § 564(a)). Amtrak was required to provide the service included within the "basic system" until July 1, 1973, after which it could effect discontinuances as provided in the Act. (45 U.S.C. § 564(b)). If "consistent with prudent management," Amtrak can also provide intercity rail passenger service in excess of the basic system. It can, however, discontinue such additional service at any time, except that any excess service provided for a continuous period of two years becomes part of the "basic system." (45 U.S.C. §§ 563(a), 564(b)(2)).

In establishing the Amtrak program, Congress recognized[7] that (1) a number of uneconomic trains would have to be eliminated and (2) one of the most difficult aspects of the program would be deciding which trains to eliminate. In order to insure that these decisions were wisely made, Congress prescribed (45 U.S.C.

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[6] The Central of Georgia trains involved in this litigation were discontinued under this provision on May 1, 1971. They consisted of two daily trains between Atlanta and Savannah, Georgia and two trains between Albany, Georgia and Birmingham, Alabama which ran on alternate days.

[7] "[A] rational reduction of the present system will be required to save *any* passenger service. The remaining service must be organized into a cohesive system requiring a management which takes into consideration the needs and abilities of the entire system which will be a replacement for the diverse managements of the present unintegrated and in many instances unwanted (by management) passenger service." [H.R. Rep. 91-1580, p. 3].

§ 521) specific policy factors to be considered in the designation of the basic system [8] and further provided that the basic system would not become final until the Secretary of Transportation had responded in writing to all recommendations he received from the Interstate Commerce Commission, the various State Commissions, the representatives of the railroads, and railroad labor organizations concerning the passenger service to be maintained. (45 U.S.C. § 522).

Finally, to insure that this program would be carried out in accordance with the terms and purposes of the Act, Congress provided in Section 307 (45 U.S.C. § 547) an enforcement procedure largely borrowed from the Comsat Act.[9] Section 307(a), the focus of the present case, provides that the Attorney General of the United States and, in cases involving labor agreements, affected employees and their representatives may petition the District Courts to enjoin any action by Amtrak or a railroad which violates the Amtrak Act or threatens to obstruct its purposes. Section 307(b) indicates

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[8] In initially deciding which trains to include in the basic system, the Secretary of Transportation utilized an interrelated set of eight criteria:

(1) The Nation's total transportation needs.
(2) Demand for the particular service.
(3) Cost of the particular service.
(4) The need for an integrated national rail network.
(5) Population of the points served.
(6) Profitability of the particular service.
(7) Potential for flexible service adjustments by Amtrak.
(8) Capital improvements required by the service.

(See pages 81-82 of Exhibit A to this brief.)

[9] See Section 403 of the Communications Satellite Act of 1962 (47 U.S.C. § 743) set out in footnote 39, pp. 36-37, *infra*.

that the section leaves unaffected any causes of action which arise other than from a violation of the Act.[10]

SUMMARY OF ARGUMENT

Section 307 of the Amtrak Act provides only for enforcement suits by the Attorney General in non-labor cases such as this. By the established construction principle that specific Congressional expression of one remedy excludes other remedies not expressed, Section 307 allows such suits *only* when brought by the Attorney General, and not by any "aggrieved person." The Court of Appeals rejected this statutory interpretation despite the legislative history that strongly supports it.

During the hearings on the Amtrak Act, representatives of organized labor proposed and vigorously argued for an amendment to Section 307 which would, *inter alia,* have authorized suits by any "aggrieved person." The Secretary of Transportation acquiesced in certain aspects of the suggested amendment (principally, making Section 307 applicable to railroads as well as Amtrak), but opposed the proposal to allow suits by any "aggrieved persons." He recommended that Section 307 permit suits only by the Attorney General and employees and their authorized representatives. Congress followed the Secretary's recommendations carefully and precisely. It redrafted Section 307 to incorporate the suggestion in which he acquiesced but rejected labor's proposal to allow suits by any "aggrieved person" and instead adopted his alternative formulation.

The decision below is also erroneous because its interpretation of Section 307 would severely hamper

[10] Thus, suits for personal injuries allegedly caused by negligent operation of Amtrak trains are not barred by the Act.

Amtrak's achievement of its Congressional mandate to create and administer a viable national system of rail passenger service. Private suits by any railroad passenger or other "aggrieved person" could, even if unsound on their merits, result in restraining orders or preliminary injunctions that would force Amtrak to continue the operation of uneconomic trains. This would cost Amtrak (and thus the federal treasury) substantial sums of money and would seriously disrupt Amtrak's closely coordinated plans for operating an integrated national system of intercity rail service.

The court below erred in relying on a novel theory that the specific jurisdictional limits imposed by Section 307 of the Amtrak Act could be disregarded because of the general jurisdictional grant of 28 U.S.C. § 1337 regarding controversies arising under statutes regulating interstate commerce. But that theory overlooks the established principle that specific statutory provisions must, when applicable, take precedence over more general provisions in the same or a different statute. Furthermore, even if Section 1337 could confer jurisdiction on the District Court in a suit such as this, that general jurisdictional statute merely allows adjudication of a cause of action arising under some other statute regulating commerce, and does not itself give rise to a cause of action. The Amtrak Act creates no private cause of action under which persons other than the Attorney General may bring suit to enjoin its alleged violation. Since the Attorney General and other legislative and executive institutions responsible for monitoring Amtrak's activities are quite capable of insuring Amtrak's full compliance with the Act, there is no reason in this case to create a private cause of action by implication.

ARGUMENT

I. THE DECISION BELOW MISCONSTRUES THE PLAIN LANGUAGE AND THE LEGISLATIVE HISTORY OF SECTION 307.

A. The Language of Section 307 Clearly Precludes Private Parties Other Than Employees and Their Representatives from Suing Amtrak or a Railroad for Alleged Violations of the Act.

Section 307 of the Amtrak Act identifies only the Attorney General as a proper party to sue for enforcement of the Act in non-labor cases.[11] It is a well-established principle of statutory construction that, where Congress has expressly specified one party or remedy, courts will not expand the coverage of the statute to include other parties or remedies. As Section 307 specifically authorizes suit by the Attorney General, this principle indicates that he is the *only* proper plaintiff in enforcement actions not involving labor agreements.

Courts have traditionally relied on this principle as an aid to statutory construction, particularly when—as is the case here—it is supported by legislative history revealing a clear intent to exclude other parties or meanings. *See, e.g., Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929); *Maiatico* v. *United States*, 302 F. 2d 880, 886 (D.C. Cir. 1962); *United States* v. *Chicago Title and Trust Co.*, 242 F. Supp. 56, 65 (N.D. Ill. 1965); *Ex Parte York County Natural Gas Authority*, 238 F. Supp. 964, 979 (W.D. S.C. 1965); *Anderson* v. *Gladden*, 188 F. Supp. 666, 679 (D. Ore. 1960). As noted in *McDonald* v. *Board of Election Commissioners*, 277 F. Supp. 14, 17 (N.D. Ill. 1967, it is "a rule of statutory construction that where a statute enumerates persons affected, it must

[11] The full text of Section 307 is set out at pages 2-3, *supra*.

be construed as excluding from its effect all those not expressly mentioned."[12]

The court below rejected this analysis on the ground that "whatever superficial appeal the maxim may have, . . . it is only an aid to statutory construction, not a rigid rule of law." (SA 29). The court was certainly correct that the *expressio* principle should not be applied blindly, but neither logic nor the authorities cited by the court suggest that the principle should be rejected for no reason at all. Those authorities point out only that the doctrine "can never override clear and contrary evidence of Congressional intent." *Neuberger* v. *C.I.R.*, 311 U.S. 83, 88 (1940). As stated by the Court of Appeals for the First Circuit in *Massachusetts Trustees of Eastern Gas & Fuel Assoc.* v. *United States*, 312 F. 2d 214, 220 (1st Cir. 1963), *aff'd* 377 U.S. 235 (1964), "whether the specification of one matter means the exclusion of another is a matter of legislative intent for which one must look to the statute as a whole."

More generally, as a matter of sound statutory interpretation, there must be some recognized guidelines for construction so that courts, legislators, and affected citizens can agree on how legislative enactments will be applied in particular cases. Petitioners do not argue that the *expressio* principle is an absolute and irrebutable rule which answers all questions about the reach of statutory provisions. But the principle has considerable force because of its intrinsic logic and frequent past applications and should not be

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[12] Courts sometimes make shorthand reference to this principle through the maxim *expressio unius est exclusio alterius*. See *United States* v. *Chicago Title and Trust Co.*, *Ex Parte York County Natural Gas Authority*, and *Anderson* v. *Gladden*, *supra*.

disregarded unless independent sources within the legislative history demonstrate that Congress did not in fact intend to exclude other parties or remedies than those specified. In the present case, the legislative history, far from suggesting that the principle is inapplicable, strongly supports the inference that Congress *did* intend to exclude other parties from initiating enforcement actions.

B. The Legislative History of Section 307 Reveals Congress' Intent To Limit the Power To Enforce the Amtrak Act to the Attorney General.

In the context of this case, the significant fact in the legislative history is that Congress considered but rejected a proposed amendment to Section 307 that would have authorized any aggrieved person to sue to enjoin violations of the Act.

The original draft of the bill, considered by the House Interstate and Foreign Commerce Committee in June 1970, provided [13] that the District Courts would have jurisdiction to entertain suits against Amtrak (but not individual railroads) "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any individual affected thereby . . .". At the hearings spokesmen for organized labor urged that the bill be amended to allow actions against railroads as well as Amtrak and to permit suits by "any person adversely affected or aggrieved thereby, including the represen-

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[13] Supplemental Hearings on H.R. 17849 and S.3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., Serial 91-62 (1970) (hereinafter cited as "Supp. Hearings") p. 43.

tatives of the employees of any railroad or of the Corporation." One labor witness explained that,

> [t]he . . . amendment we propose would modify the language of Section 307(a) . . . so as to provide that any aggrieved party, including employee representatives, could institute legal proceedings for violations of the law . . . .
>
> *As the bill now reads, only the Attorney General, except in cases involving a labor agreement, could bring actions.* [Supp. Hearings p. 134, emphasis added].[14]

Secretary of Transportation Volpe was asked by the Committee to comment on these proposed changes. In response he furnished the Committee with a letter in which he stated that he did not object to that portion of the proposed amendment which would allow suits against railroads as well as Amtrak. On the other hand, concerning the proposal to amend the bill to permit suits by any "aggrieved person," he stated:

> Sanctions are normally imposed by the Government. Consequently, *I would be opposed to permitting "any person" to seek enforcement of section 307. I would have no objection, however, if the section were revised to permit employee representatives, as well as employees affected, to seek equitable relief.* [Supp. Hearings p. 85, emphasis added.]

The Committee redraft of Section 307 and the bill as finally enacted are in exact conformity with Secretary Volpe's recommendations. Railroads were added to its reach, but labor's other proposal, which would have

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[14] See also Supp. Hearings at pp. 119, 122, 141.

permitted suit by any aggrieved party, was completely rejected and Secretary Volpe's language adopted instead.

The case is thus similar to *National Automatic Laundry and Cleaning Council* v. *Schultz*, 443 F.2d 689 (D.C. Cir. 1971) in which the court likewise found clear indication of legislative purpose in Congress' rejection of amendments designed to limit the reach of a broad remedial provision.[15] That the rationale for rejecting the amendment in the *National Automatic Laundry* case was articulated by a Congressman and in this case was articulated by the cabinet officer principally responsible for overseeing the subject program is irrelevant. The intent of Congress can properly be divined from its acceptance of an Executive branch recommendation as well as from statements made during floor debate. Indeed, the intention of the Congress is even more evident here than in *National Automatc Laundry*. Here Congress did not simply ignore or reject labor's proposal but instead carefully adopted that portion of the suggested amendment which Secretary Volpe endorsed, rejected the specific portion he opposed, namely, the suggestion that any "aggrieved person" should be able to bring suit, and instead adopted his alternative formulation permitting suit by the Attorney General, employees and their representatives.

The court below acknowledged the existence of this legislative history but discounted its significance. Cit-

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[15] "In the matter before us there is not merely silence, proposals languishing without any Congressional action, but positive action by Congress rejecting the limiting amendments." [443 F.2d at 706].

ing *Trailmobile Co.* v. *Whirls,* 331 U.S. 40 (1947), the court stated that it was unwise to rely on statutory changes made in Congressional committees without explanation. In the *Trailmobile* case, however, the legislative history was entirely inconclusive; there were no comments from *any* source whatever concerning the issue involved. In this case there was an abundance of comment. Two prominent labor spokesmen vigorously requested a specific change in statutory language. The Secretary of Transportation urged that this broad proposal be rejected and suggested an alternative formulation which was subsequently adopted. In view of this clear legislative history, it hardly requires a "strained process of deduction," as the court below viewed the matter (SA 36), to realize that Congress consciously and carefully chose not to permit all allegedly aggrieved parties to maintain suits for supposed violations of the Amtrak Act.

By suggesting that only reported debates or formal statements by members of Congress are useful indicia of intent, the court below has taken too narrow a view of the legislative process. This approach ignores the fact that Congressional committees bear the principal burden of formulating precise legislative language, and it is their actions and decisions which most accurately evidence the nuances of statutory meaning.

In drafting Section 307, the House Committee on Interstate and Foreign Commerce heard comment on and then rejected labor's proposal to allow any injured party to sue and adopted a counterproposal by the Secretary of Transportation. While individual opinions of private witnesses at committee hearings may sometimes be of doubtful value in determining legisla-

tive intent,[16] courts have traditionally deferred to the opinion of the administrative officer statutorily charged with administration of the act. *See, e.g., Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 381 (1969); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *United States* v. *City of Chicago*, 400 U.S. 8, 10 (1970); *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970); *Bowman* v. *Department of Agriculture*, 363 F.2d 81 (5th Cir. 1966); *Philadelphia Television Broadcasting Co.* v. *FCC*, 359 F.2d 282 (D.C. Cir. 1966). Some federal courts have recently viewed this deference as mandatory in the absence of clear, compelling language to the contrary. "The Secretary's interpretation . . . if reasonable, must be given effect." *Alexander* v. *Richardson*, 451 F.2d 1185, 1187 (10th Cir. 1971). The Secretary of Transportation has substantial responsibility for establishing the Amtrak program and supervising its operation,[17] and certainly his opinion (that the language he proposed for Section 307 would give the Attorney General exclusive enforcement power in non-labor cases) is entitled to great weight.

Furthermore, the Attorney General has taken the position that "in non-labor agreement cases, Section 307 of the Act . . . reserves to the Attorney General the exclusive right to sue Amtrak or any railroad for

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[16] *But see, Chicago & Northwestern Railway Company* v. *United Transportation Union*, 402 U.S. 570 (1971), in which this Court, in construing the Railway Labor Act, attributed great weight to the statements of spokesmen of railroad management and labor made in hearings before the House Committee on Interstate and Foreign Commerce.

[17] See, for example, 45 U.S.C. §§ 521, 522, 548, 563, 602, 621, and 645.

actual or threatened violation of the policies and provisions of the Act."[18] This interpretation was recently reaffirmed in the Memorandum for the United States filed by the Solicitor General in support of the petition for a writ of certiorari in this case. As this Court has noted, courts should respect the construction of an administrative statute given "by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961).

The court below also sought to demonstrate Congress' intent to allow private enforcement of the Act by showing that it specifically denied judicial review in other sections of the Act. (SA 38). Section 202 of the Act (45 U.S.C. § 522) states that the Secretary's designation of which railroad lines shall constitute the basic system "shall not be reviewable in any court." The Court of Appeals argued that Congress therefore knew how to draft decisively when it wished to limit judicial review and would have put the word "only" before the phrase "upon petition of the Attorney General . . ." had it wished to preclude suits by anyone else.

There is no logical or practical inconsistency between Section 202 and petitioners' construction of Section 307. Section 202 involves a Government official's

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[18] *See* letter of Acting Assistant Attorney General E. Grey Lewis, dated September 6, 1972, set out as Appendix E to the certiorari petition (p. 42a).

exercise of administrative authority of the sort normally reviewable by courts. Section 307, on the other hand, involves suits against private railroad companies and Amtrak, which is explicitly not an agency of the Federal government. Having withdrawn the designation of the basic system from judicial review in Section 202, it would certainly have been anomalous for Congress to provide disappointed train passengers in Section 307 with an equally effective method of fighting the elimination of their lines, namely, institution of expensive and protracted actions to enjoin the discontinuances.

The analysis of the legislative history by the court below also rests on the assumption that Section 307 is "redundant" (SA 31) and that Congress "might well have believed, notwithstanding the remarks of railway labor representatives, that Section 307 as originally drafted did not bar suits by all injured and aggrieved parties." (SA 36). While these and other explanations are, of course, "conceivable" (to use the court's language, SA 36), they do not appear likely.

As distinguished from such speculations, the Secretary of Transportation, the Attorney General, and the Solicitor General have all advanced the more logical explanation that Section 307 simply means what it says, namely, that to invoke the jurisdiction of the District Courts, suits to restrain violation of the Amtrak Act must be brought by affected employees, their representatives, or the Attorney General. Petitioners submit that the legislative history of the Section, its plain language, and the purposes of the Act all confirm this construction.

II. THE DECISION BELOW WOULD SERIOUSLY FRUSTRATE THE FUNDAMENTAL PURPOSES OF THE AMTRAK ACT.

Not only does the decision by the Court of Appeals misconstrue the language and the legislative history of Section 307. In addition, that court's interpretation of Section 307 would severely hamper the achievement of the statute's purpose. Indeed, a decision by this Court affirming the holding below that any railroad passenger, passenger association, or other aggrieved person may sue Amtrak or a railroad for any supposed violation of this comprehensive legislation could so hobble this program for saving the nation's rail passenger service as to effectively prevent fulfillment of that important legislative goal.

The House Report which accompanied the bill that became the Amtrak Act stated that "the overriding purpose of this legislation is to preserve and promote intercity rail passenger service . . ." (H.R. Rep. 91-1580, p. 2). Accomplishment of this goal, Congress concluded, would require a national management corporation which could weld the passenger operations of numerous railroad companies into a single, cohesive system and could act decisively and innovatively to make that system a viable transportation mode as quickly as possible.[19] Amtrak has already made significant progress toward achieving that goal,[20] but

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[19] See pages 5-7, *supra*.

[20] The Amtrak Act, as amended, 45 U.S.C. § 645, (Supp. II 1972), required the Secretary of Transportation to transmit to Congress by March 15, 1973, a comprehensive report on the effectiveness of the Act and the Corporation in promoting intercity rail passenger service. That report is filed as Exhibit A to this brief and concludes that, during its first 22 months of operation, "Amtrak has

the program is still in a formative period, and there is a great deal yet to do.[21] During the months and years ahead, Amtrak will need to take countless actions to improve and streamline the national railroad passenger system it was created to manage. Of necessity, many of these actions will affect very large numbers of passengers and other persons.

Under the decision below, each of the several million passengers who ride Amtrak trains is a potential plaintiff in a suit to enjoin some Amtrak action he does

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taken important steps to improve intercity rail passenger service." (Ex. A, p. 4). Several indicators of such progress are cited:

> "Ridership in the period May-November 1972 was 11% higher than in the corresponding period of 1971.
>
> The net cash loss from operations in FY 1972 was $152.7 million; the FY 1973 loss is estimated at $124.0 million. Under the route and service levels recommended in this report it is estimated to decline further to $95.6 million in FY 1974.
>
> Revenue increased from $150.5 million in FY 1972 to an estimated $179.4 million in FY 1973.
>
> Amtrak acquired its own fleet of 1550 passenger cars and 420 locomotives. A major refurbishment program is underway.
>
> New turbine powered trains have been either purchased or ordered from U.S., Canadian, and French manufacturers.
>
> Amtrak simplified tickets, timetables and fares; a new computerized reservation system is being implemented.
>
> On-train services have improved measurably; train directors are being placed on most trains to supervise services." (Ex. A, p. 4).

[21] "Programs actively underway provide for improving equipment, reservations, schedules, fare structure, food service, and other passenger comforts. Administrative changes necessary to the efficient and economic operation of the corporation are also underway, and include improved data collection on revenue, expenses and ridership, improved cost control, auditing of contracts with participating carriers and assuming direct control over functions solely related to intercity passenger service." (Ex. A, p. 3).

not like.[22] Virtually everything Amtrak does could be made the basis of an injunctive action by an "aggrieved" passenger—the discontinuance of a particular train, a revision in schedules and timetables, changes in on-board services (as, for example, substituting snack bar service in place of a dining car, or reclining parlor chairs in place of a sleeping car), revamping of ticketing and reservation procedures, a redesignation of intermediate stops along a particular route, and so on.

Furthermore, the decision below is not limited to railroad passengers, but expressly encompasses all allegedly injured and aggrieved parties. (SA 43). Thus, Amtrak actions in purchasing new rolling stock, refurbishing present equipment, upgrading roadbed, changing mail and baggage car arrangements, and many other matters could easily become the subject of injunctive actions brought by affected parties other than passengers.[23]

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[22] In 1972 Amtrak trains carried approximately 16,600,000 passengers, about 96% of the nation's total number of intercity rail passengers for that year. *See* Hearings before the Subcommittee on Department of Transportation and Related Agencies of the House Committee on Appropriations, 93rd. Cong., 1st Sess., (1973) Part 2—p. 1054.

[23] *Compare* District Judge John P. Fullam's observation, quoted in *In re Penn Central Transportation Co.*, 446 F.2d 1109, 1113 (3rd Cir. 1971), *cert. denied* 405 U.S. 918 (1972);

> "It is a matter of common knowledge that very many interested persons and governmental entities and agencies question the adequacy of intercity rail passenger service proposed to be supplied by Railpax [Amtrak]. It is not inconceivable that, if they were free to do so, large numbers of such persons, entities and groups might seek to litigate particular issues in a wide variety of forums."

The effect of this kind of litigation on the ability of Amtrak to carry out its Congressional mandate can best be appreciated by focusing on a single example. In its Report to Congress of March 15, 1973, the Department of Transportation set forth a detailed analysis of Amtrak's present route structure. The report pointed out that the establishment of an optimum national route system was a dynamic process and would require continued re-examination and adjustment. (Ex. A, p. 79). On the basis of the same eight criteria initially used to designate the basic system, the report concluded that most of Amtrak's routes should be left intact but that certain modifications were in order because of the excessive deficits experienced on those lines. Thus, the Department recommended that Amtrak discontinue the Chicago-Florida train (deficit for fiscal year 1972—$5.1 million), the New York-Kansas City train ($5 million deficit), and the Washington, D.C.—Parkersburg, West Virgina train ($700,000 deficit) and that service be reduced and rearranged on the Chicago-Houston run ($4.5 million deficit) and Chicago-Newport News train ($4.4 million deficit). (See Ex. A, pp. 80-98).[24]

If, pursuant to these recommendations, Amtrak seeks to discontinue the New York-Kansas City train in order to achieve a viable national system, many passengers who ride that train may feel themselves "aggrieved." If any one of these passengers files a

[24] These recommendations closely coincided with those made by Amtrak and its consultant McKinsey & Company. (Ex. A, p. 6). In each case, where the Department of Transportation recommended discontinuance of a particular service, "well-developed alternatives [i.e., other transportation modes] are available." (Ex. A, p. 83).

complaint[25] advancing even a superficially plausible theory under which such a discontinuance would violate the Amtrak Act, a District Judge unfamiliar with the intricacies of the statute may feel that preliminary injunctive relief is necessary to preserve the status quo until the merits of the matter can be fully briefed and adjudicated.[26] After a decision on the merits in the District Court, there is the possibility of further substantial delay if an injunction or restraining order is obtained while the case is on appeal. Even if Amtrak ultimately wins such a suit, the continued operation of the uneconomic train during the litigation would cost Amtrak (and thus the federal treasury) thousands or even millions of dollars.

Moreover, since the New York-Kansas City train passes through nine states, a number of injunctive actions could easily be filed in several different Dis-

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[25] Under the Act as presently drafted, 45 U.S.C. § 564(b)(3), discontinuances of basic system trains, such as New York-Kansas City, are subject to the provisions of Section 13a of the Interstate Commerce Act. Because of the extensive monitoring of Amtrak by the Executive Branch and Congress, the Department of Transportation has urged Congress to exempt Amtrak from such ICC jurisdiction to avoid the possibility that Amtrak could be required "to perform an uneconomic service, through an extended period of litigation, at substantial cost to the general taxpayer." (Ex. A, p. 108). Unless they have been operated for two continuous years, experimental trains not required by the designated basic system, like the Washington, D.C.-Parkersburg train, can be discontinued by Amtrak at any time without ICC approval. 45 U.S.C. § 564(b)(2).

[26] Such a temporary restraining order was granted, then extended, by Chief Judge Blumenfeld in *Wood* v. *National Railroad Passenger Corporation*, 341 F.Supp. 908 (D. Conn. 1972), but later dissolved when Amtrak prevailed on the merits.

trict Courts,[27] possibly located in different Circuits. If only one of these suits resulted in a preliminary injunction, the planned train discontinuance could be delayed until the conflicting decisions of the various District Courts were resolved by a Court of Appeals or, perhaps ultimately by this Court.

It was exactly these considerations which the Solicitor General cited in urging this Court to grant certiorari in the present case:

> Amtrak deficits resulting from operation of uneconomic and unneeded trains must be minimized if Amtrak's limited resources are to be put to the best possible use in the permanent improvement of the rail passenger system. The court of appeals' decision, however, is likely to frustrate that purpose.
>
> The decision is likely to lead to a large number of lawsuits, filed by states, localities, or private persons or associations, designed to delay or defeat Amtrak's curtailment or elimination of uneconomic or unneeded service. This is particularly likely when the only alternatives are loss of service or subsidies from local budgets for the service (45 U.S.C. 563(b)). Moreover, it is probable that stays of the discontinuance of service will be issued in many of those cases, thereby requiring Amtrak to continue the service for the duration of the litigation. The likely result of

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[27] When Amtrak made certain changes in its "Empire Service" between New York City and Buffalo, including the discontinuance of certain trains between New York City and Albany, two separate suits were brought to enjoin those changes—one by the Commissioner of Transportation of the State of New York in the United States District Court for the Northern District of New York, another by the City of New York in the United States District Court for the Southern District of New York. See *Schuler et al* v. *National Railroad Passenger Corporation et al.*, No. 72-CV-211 (N.D. N.Y.) and *City of New York* v. *National Railroad Passenger Corporation, et al.*, No. 72 Civ. 1988 (S.D.N.Y.).

> permitting such suits to be maintained, therefore, is a further drain on Amtrak's limited resources and their diversion into activities that are inconsistent with and unnecessary to the Congressional plan to improve and rehabilitate intercity rail passenger service. (Memorandum for the United States, pp. 4-5).

The burden imposed upon Amtrak by even a single preliminary injunction would not be limited merely to the direct costs of the continued operation of the particular train involved. Substantial amounts of rolling stock scheduled for use in other locations would be tied up. Planned schedule changes in the operation of other trains might well be made impossible because of problems with connections, personnel transfers, layovers, and so forth. In short, because the viability of the overall passenger system depends on the efficient coordination of many different services, one major injunctive action could disrupt Amtrak's operations as severely as a multitude of lawsuits.

The inability of individual passengers to bring private lawsuits would not, of course, leave these passengers remedy-less or grant Amtrak freedom to disregard the policies and provisions of its governing Act. Running a national system of railroad passenger trains is hardly an inconspicuous business, and everything Amtrak does is closely watched and monitored by a variety of interested governmental agencies which can certainly be counted upon to act on their own initiative, as well as in response to significant complaints, to insure that Amtrak obeys the letter and spirit of the law. Under the Act, the Secretary of Transportation, the Interstate Commerce Commission, and the Corporation itself are required to submit to the President and the Congress extensive annual re-

ports on the state of the program, and Amtrak is also required to submit detailed monthly reports on its operations. (45 U.S.C. § 548). Several Congressional committees are keenly interested in Amtrak and have held hearings to oversee its progress.[28] And the Attorney General has established an Amtrak section within the Department of Justice to insure that the program is being carried out in conformity with the terms and purposes of the Act.[29]

If Amtrak attempts some major program which is inconsistent with achievement of the desired legislative goal, one can be sure that interest groups like the National Association of Railroad Passengers will promptly bring the matter to Congress' attention.[30] And if such groups should believe that a specific action by Amtrak violates the Act, they may present that con-

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[28] Since enactment of the Amtrak Act, the Senate Commerce Committee and the House Interstate and Foreign Commerce Committee have each held two sets of hearings (in the spring of 1972 and the spring of 1973) to review Amtrak's progress under the Act. Amtrak has also been subject to annual appropriation hearings in both the Senate and the House.

[29] Supplemental Memorandum of National Railroad Passenger Corporation filed in the Court of Appeals September 22, 1972 (hereafter "Supp. Memo.") p. 5.

[30] Anthony Haswell, President of respondent National Association of Railroad Passengers, has frequently testified before the House Interstate and Foreign Committee and other Congressional Committees. (SA 16). In the hearings leading to passage of the Amtrak Act, he testified that,

> "I feel that it would be unnecessary and inconsistent to, in effect, put a lot of teeth into the hands of some other Federal agency to make sure that the Corporation is ordered to do the very thing that it is being brought into existence to do. This Corporation will not have its attention diverted by having to run freight trains or looking around for juicy investments in real estate, or whatever. Its purpose for being

tention to the Attorney General and request that he seek an injunction.[31] The Attorney General is well suited to act as an overall "watchdog" of the Amtrak program and to decide what lawsuits should be brought and what relief sought in order to insure compliance with the essential provisions of the legislative charter. If, however, all actions taken or proposed by Amtrak may be enjoined, even temporarily, at the behest of any "aggrieved" passenger or other private party, it will truly be impossible for Amtrak to carry out the complicated and closely coordinated planning or the innovative and responsive action on which the achievement of its Congressional mandate is premised.

III. THE DECISION BELOW MISAPPLIES 28 U.S.C. §1337 TO THIS CASE.

In the final portion of its opinion, the Court of Appeals finds support for its decision in a novel theory which was never briefed or mentioned by the parties below. Under this theory (SA 43), Section 307 of the Amtrak Act gives the Attorney General the right to seek injunctions for violations of the Act and for any action, practice or policy which, though not a

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is to run passenger trains. Therefore, I am not concerned about the absence of strong controls or directives and so forth either in the statute itself, enforceable by the courts, or in the hands of some other agency. *I am certain, if, after the first year, we are not getting the results that we want along these lines, the Congress will take a very thorough look. The statute requires that reports must be given every year to the Congress. So, I am willing to set this thing up with positive incentive and encouragement and let it go at least for a while.*" (Supp. Hearings, p. 178, emphasis added.

[31] Indeed, respondent's present complaint was studied by the Amtrak section at the Department of Justice which concluded, after consultation with the Department of Transportation, that the Amtrak-Central of Georgia contract does *not* violate the Act. (Supp. Memo. p. 5).

direct violation, is nonetheless inconsistent with the purposes of the Act, while Section 1337 of Title 28, United States Code[32] gives all aggrieved persons the right to sue Amtrak and the railroads for actual violations of the Act. (SA 31).

This analysis, which would make a nullity of Section 307, ignores the well-established principle of statutory construction that "specific terms prevail over the general in the same or another statute which might otherwise be controlling." *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957); *see also MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944); *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932). The specific language of Section 307 is expressly jurisdictional—"the district court . . . shall have jurisdiction . . . upon petition of the Attorney General"—and even fixes the venue for actions seeking to restrain violations of the Act, i.e., "the district in which the Corporation or other person resides or may be found." Such a specific jurisdictional grant in a particular Congressional enactment must supersede the general jurisdictional grant of 28 U.S.C. § 1337. If this were not so, it would be meaningless for Congress to insert specific jurisdictional provisions in any of the vast number of statutes it has enacted under the commerce clause since any allegedly aggrieved party could ignore such specific jurisdictional limits—of which there are many—by invoking the general jurisdiction of the District Court under Section 1337.

But this is not the law. For example, in the recent case of *Barlow* v. *Collins*, 397 U.S. 159, 167 (1970),

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[32] 28 U.S.C. § 1337 provides that "the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

relied upon in the decision below (SA 24-25), this Court cited *Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297 (1943) for the proposition that "a clear command of the statute will preclude [judicial] review, and such a command may be inferred from its purpose." *Switchmen's* held that the "broad grant of general jurisdiction" contained in the predecessor to 28 U.S.C. § 1337 could not be invoked "in the face of the special circumstances" present in that case, namely, Congress' obvious efforts to protect the National Mediation Board's handling of the "explosive" problem of collective bargaining unit certification and the "highly selective manner in which Congress has provided for judicial review" under the Railway Labor Act. (320 U.S. at 300, 303, 305). The Court's opinion declares:

> Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. . . . In such a case the specification of one remedy normally excludes another. [320 U.S. at 301].[33]

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[33] See also *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 at 720 (1967): "Where a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." *Cf. Schilling* v. *Rogers,* 363 U.S. 666 at 674 (1960): "The point is that in this Act Congress was advertent to the role of courts and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation."

The Court of Appeals seeks to distinguish the *Switchmen's* case on the ground that there a "neutral administrative body"—the Mediation Board—was resolving disputes between competing interests. (SA 44). But the Court in *Switchmen's* talked in terms of Congressionally fashioned "machinery" and "tools," not the existence of a particular administrative body. It is not only courts and boards which can provide protection to affected individuals. As noted above, in framing the Amtrak Act Congress established several specific procedures and provisions to insure that the subject program would be carried out in the best interests of the traveling public:

—The Secretary of Transportation was required to solicit and consider the views of interested persons, before finalizing his proposal for the "basic system." (45 U.S.C. § 522).

—The majority of Amtrak's Board of Directors is appointed by the President of the United States. (45 U.S.C. § 543).

—Amtrak is made subject to many, but not all, provisions of the Interstate Commerce Act. (45 U.S.C. § 546).

—Amtrak, the Secretary of Transportation, and the Interstate Commerce Commission are all required to submit to the President and the Congress annual reports on progress made under the Amtrak program and recommendations for the future, and Amtrak is required to submit to the Congress and release to the public detailed monthly reports on its operations. (45 U.S.C. § 548).

—Accounts of the Corporation are to be audited annually by independent certified public accountants and, if appropriate, the Comptroller General. (45 U.S.C. § 644).

—The Attorney General is empowered to seek injunctions for any actual or threatened violation of the Act. (45 U.S.C. § 547).

Surely here, as in *Switchmen's*, it is clear that Congress has selected the machinery which it deems suited to protection of persons affected by the Amtrak program. To hold, in the face of these specific safeguards, that any aggrieved person may also sue Amtrak under the general jurisdictional grant of 28 U.S.C. § 1337 is to disregard entirely Congress' efforts to protect Amtrak from unnecessary and potentially disruptive litigation. As the Court noted in *Switchmen's*,

> Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain. [320 U.S. at 303.] [34]

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[34] The court below also noted that Switchmen's grew out of a field long relegated to conciliation and mediation, while railroad discontinuances have historically been subject to administrative and judicial review. (SA 44-45) But the Amtrak Act expressly embodies a radical departure from past practice—under 45 U.S.C. § 561(a), any railroad participating in the Amtrak program need only file a thirty-day notice to discontinue an intercity train, the old hearing and review procedure of Section 13a of the Interstate Commerce Act having been there dispensed with. In light of this sharp break with the past, it hardly seems likely that Congress would attempt to sneak in through the back door of Section 1337 an even broader right of judicial recourse than had previously existed when federal courts could only review ICC decisions in discontinuance cases on a "substantial evidence" basis. *State of New York* v. *United States*, 299 F.Supp. 989, 994 (N.D. N.Y. 1969, Waterman J.), *aff'd* 396 U.S. 281 (1970).

Furthermore, even assuming that Section 1337 were to give the District Court jurisdiction to entertain the present suit, which we deny, the question would remain whether a passenger association has any enforceable cause of action on which to sue. As this Court stated in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951), 'the Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources . . . .'' *Cf. Bell* v. *Hood*, 327 U.S. 678 (1946).

Section 1337 of the Judicial Code vests jurisdiction in the District Courts only for suits "arising under any Act of Congress regulating commerce." Thus, we are necessarily remanded to the Amtrak Act to see if that Act gives rise to any such private cause of action as the National Association of Railroad Passengers here asserts. Clearly there is no section of the Act which does so. Although Congress was aware of the kind of complaints passengers could be expected to have in regard to Amtrak operations,[35] it did not set forth in the Act any private right of action for railroad passengers in particular or "aggrieved parties" in general. Congress did, however, confer limited rights of action on two specific groups—employees and their representatives in cases involving labor agreements (45 U.S.C. § 547) and railroads seeking to recover compensation for the provision of facilities or services (45 U.S.C. § 562). It also vested the Attorney General with the general power to enforce the terms and purposes of the Act.

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[35] *See, for example*, S. Rep. 91-765, p. 4.

The conclusion of the court below that private suits are necessary to insure realization of the goals of the Amtrak Act rests on the unsupported premise that the Attorney General cannot or will not act aggressively and effectively to enforce the provisions of the Act. This premise is wholly unwarranted.[36] As noted above, the Attorney General has established an Amtrak section within the Department of Justice. In conjunction with the Department of Transportation, that section has reviewed various complaints about alleged violations of the Act, including those of the respondent. The Attorney General's ability to exercise his informed discretion in deciding which situations warrant judicial intervention is, as Secretary Volpe suggested to Con-

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[36] Cases such as *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), and *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), cited by the Court of Appeals for implying such a private right of action here are inapposite. Unlike the Securities Exchange Act of 1934 or the Voting Rights Act of 1965, the Amtrak Act does not seek to establish enforceable individual rights in a broad class of persons but attempts to save a threatened national resource for use by the public in general. Unlike the statutes in *Borak* and *Allen*, the Amtrak Act is not ambiguous; it clearly defines who may bring enforcement actions— the Attorney General. And the scope of possible violations is well within the Attorney General's enforcement power— while there may annually be hundreds or thousands of Security Act violations or voting frauds throughout the country, possible violations of the Amtrak statute are not so numerous as to suggest that the Attorney General cannot monitor the way Amtrak is conducting its business and bring suits therefor if necessary. In such circumstances, no private right of action should be implied. *Calhoun* v. *Harvey*, 379 U.S. 134 (1964); *Montana-Dakota Utilities Co.* v. *Northwest Public Service Co.*, 341 U.S. 246 (1951); *B.F. Goodrich Co.* v. *Northwestern Industries, Inc.*, 424 F.2d 1349 (3rd Cir. 1970), *cert. denied*, 400 U.S. 822; *Blaney* v. *Florida National Bank*, 357 F.2d 27 (5th Cir. 1966); *Noel Estate, Inc.* v. *Commercial National Bank in Shreveport*, 232 F.2d 483 (5th Cir. 1956).

gress,[37] one excellent reason for limiting the power to bring suit to the Attorney General.

In enacting the sanction section of the Communications Satellite Act of 1962 (47 U.S.C. § 743), on which Section 307 of the Amtrak Act is closely patterned, Congress was confronted with exactly the same argument—that the Attorney General would not adequately police the actions of the proposed Comsat corporation. Senator Hubert Humphrey and Attorney General Robert Kennedy both responded that legislation of this kind must be enacted on the assumption that the Attorney General will take appropriate action to safeguard the public interest,[38] and Congress enacted the section[39] in language virtually identical to that of Section 307.

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[37] See p. 15, *supra*.

[38] 108 *Cong. Rec.* p. 16697, August 16, 1962.

[39] 47 U.S.C. § 743 provides as follows:

(a) *Petition of Attorney General for equitable relief; venue.*

If the corporation created pursuant to this chapter shall engage in or adhere to any action, practices, or policies inconsistent with the policy and purposes declared in section 701 of this title, or if the corporation or any other person shall violate any provision of this chapter, or shall obstruct or interfere with any activities authorized by this chapter, or shall refuse, fail, or neglect to discharge his duties and responsibilities under this chapter, or shall threaten any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which such corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States, to grant such equitable relief as may be necessary or appropriate to prevent or terminate such conduct or threat.

Certainly the present record provides no basis for asserting that the Attorney General cannot or will not take appropriate action to terminate actual or threatened violations of the Amtrak Act. There is thus no justification for concluding that private parties must be able to sue under 28 U.S.C. § 1337 in order to insure compliance with the terms and purposes of the Act.

CONCLUSION

The Amtrak Act was designed by Congress to deal with an emergency situation in the nation's railroad passenger service. As noted by the Court of Appeals for the Third Circuit,

> It has become painfully apparent that the condition of the nation's railroads is eroding daily. Services are being cut back, existing services are deteriorating, and the availability of working capital has become critically limited. Reacting to an ever worsening rail passenger crisis, Congress enacted the Rail Passenger Service Act of 1970, supra . . . . *The legislative history of the Act and the findings therein make clear that Congress regarded as imperative the timely implementation of the Act. In Re Penn Central Transportation Co.*, 457 F.2d 381, 386 (3rd Cir. 1972), emphasis added.

(b) *Punishment, liability or sanction under other provisions.*

Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter.

(c) *Duty of compliance with provisions of chapter and rules and regulations.*

It shall be the duty of the corporation and all communications common carriers to comply, insofar as applicable, with all provisions of this chapter and all rules and regulations promulgated thereunder.

The decision below holding that all aggrieved persons may sue Amtrak or any railroad in the District Courts to enjoin supposed violations of the Act misconstrues the language of the Act and its legislative history and threatens to severely frustrate Amtrak's efforts to achieve the important purpose for which it was created. For these reasons, petitioners respectfully submit that the decision below should be reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1973

No. 72–1289

NATIONAL RAILROAD PASSENGER CORPORATION, CENTRAL OF GEORGIA RAILWAY COMPANY, AND SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

October Term, 1973

No. 72–1289

NATIONAL RAILROAD PASSENGER CORPORATION,
CENTRAL OF GEORGIA RAILWAY COMPANY,
AND SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit.

BRIEF FOR RESPONDENT

OPINIONS BELOW

The order of the district court is unreported (SA 19). The opinion of the Court of Appeals (SA 20-54), appears at 475 F.2d 325.

JURISDICTION

The judgment of the Court of Appeals (SA 55-56) was entered on January 5, 1973, as amended January 10, 1973. The mandate has been stayed by the Court of Appeals (SA 57) pending disposition of proceedings in this Court. F.R. App. P. 41(b).

Certiorari was granted on May 14, 1973. 411 U.S. 981. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether injured and aggrieved parties may maintain actions to enjoin violations of the Amtrak Act, or whether Section 307 of the Act, 45 U.S.C. 547, bars suits by all parties other than the Attorney General of the United States, railroad employees and railroad employee representatives.

STATUTE INVOLVED

The statute involved is Section 307 of Rail Passenger Service Act of 1970, 84 Stat. 1333. The section is set forth below. The title, as enacted, is at a variance with that shown in the United States Code, and in petitioners' brief.[1]

SEC. 307. SANCTIONS.

(a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, obstructs or interferes with any activities authorized by this Act, refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which

[1] Pet. Br., pp. 2-3. Cf. 1970 U.S. Code Cong. & Adm. News 1552; 45 U.S.C. 547 (1970 ed.); [redacted] 1 U.S.C. 204(a); *United States v. Welden*, 377 U.S. 95, 98-99, fn. 4 (1964); *Stephan v. United States*, 319 U.S. 423, 426 (1943).

the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this Act.

STATEMENT

This is the first railroad passenger train discontinuance to be accorded plenary consideration since the October 30, 1970 enactment of Rail Passenger Service Act of 1970 ("Act"),[2] and the massive train discontinuances which followed on May 1, 1971.[3]

The action was brought by National Association of

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[2]P. L. 91-518, 84 Stat. 1327, 45 U.S.C. 501.

[3]The constitutionality of the Act in certain respects was sustained in *Quincy College & Sem. Corp. v. Burlington Northern, Inc.*, 328 F.Supp. 808 (N.D. Ill. 1971), aff'd per curiam 405 U.S. 906 (1972). Certain transitional matters were dealt with in *Illinois Commerce Commission v. Chicago & E.I.R. Co.*, 400 U.S. 987 (1971); *Baker v. Pennsylvania*, 400 U.S. 875 and 401 U.S. 902 (1971); *Pennsylvania v. Baker*, 405 U.S. 918 (1972). The matter of liquor sales aboard Amtrak trains is before this Court in No. 73-128, *National Railroad Passenger Corp. v. Miller*, reported below at 358 F.Supp. 1321 (D. Kans. 1973). Cf. *National Railroad Passenger Corporation v. Harris*, 354 F.Supp. 887 (W.D. Okla. 1972).

Railroad Passengers,[4] respondent herein, to enjoin the discontinuance by Central of Georgia Railway Company of its "Nancy Hanks" passenger train which operated between Savannah and Atlanta, Ga., and two other trains which operated between Albany, Ga. and Birmingham, Ala., on the ground that the proposed discontinuances on May 1, 1971 would violate sections 404(a) and 802 of the Act.[5]

While the action was pending in the district court, another judge of the same court on April 30, 1971, ruled that only the Attorney General and railroad labor have standing to sue over violations of the Act. *Congress of Railway Unions v. Hodgson,*

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[4]National Association of Railroad Passengers is a national organization of railroad patrons. No question of its standing to bring the action from the standpoint of its members being sufficiently adversely affected or aggrieved was made at any point below. The organization is the principal spokesman for railroad passengers throughout the nation.

[5]45 U.S.C. 564(a) and 642. The Court of Appeals characterized the action as follows (SA23): Section 802 provides that "no railroad may discontinue any intercity rail passenger service whatsoever other than in accordance with the provisions of this chapter* * *." Section 404(a) bars a railroad from discontinuing any of its intercity passenger trains prior to January 1, 1975, unless that railroad has entered into a contract with Amtrak pursuant to Section 401(a)(1) of the Act, 45 U.S.C. 561(a)(1). The latter provision authorizes Amtrak to contract with a railroad "to relieve the railroad * * * of its entire responsibility for the provision of intercity rail passenger service". Although Central has entered into a contract with appellee Amtrak to relieve Central of its entire responsibility for intercity rail passenger service, appellant contends that Central and Amtrak have not complied with Section 401(a)(1) because Central is but a subsidiary of appellee Southern Railway Company (Southern), which has not entered into a contract with Amtrak. In appellant's view, then, the Act requires that Amtrak either enter into a contract to relieve Southern of its entire responsibility for intercity rail passenger service or enter into no contract at all. After oral argument on appellant's motion for a temporary restraining order, the District Court dismissed the action on the ground that appellant did not have standing to maintain this action under Section 307 of the Act.

326 F.Supp. 68 (D.C. 1971). Five days later the district court in the instant proceeding issued a brief order dismissing the complaint on the ground "that the plaintiff does not (have) standing to maintain this action under section 307 of the Rail Passenger (Service) Act of 1970." (SA 19).

The Court of Appeals consolidated the instant appeal with that taken by one of the parties in *Congress of Railway Unions, supra.* The Court of Appeals on January 5, 1973 reversed the district courts in both instances.[6] In a comprehensive 34-page opinion, the Court of Appeals unanimously ruled that the fine distinctions among the doctrines of standing, jurisdiction, reviewability, and causes of action often pose thorny problems for the law, but that analysis of all these doctrines lead to the same conclusion–adjudication of the merits. (SA 24).

The decision of the Court of Appeals is consistent with that of the U.S. District Court for the District of Connecticut. *Wood v. National Railroad Passenger Corp.*, 341 F.Supp. 908 (D. Conn. 1972)

Petitioners, Central of Georgia Railway Company, Southern Railway Company, and Amtrak, applied for a writ of certiorari from this Court. The United States of America filed an Amicus Curiae brief in support of granting the writ, stating that the decision of the Court of Appeals is likely to lead to a

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[6] A petition for writ of certiorari was not sought in the companion case. *Potomac Passengers Association v. Chesapeake & Ohio Ry. Co.* The question there involved whether certain train service constituted "commuter or other short- haul" rather than "intercity rail passenger service". A similar question is pending in other courts. In one of these, *People of the State of Illinois v. Chicago & North Western Tr. Co.* (N.D. Ill.-E.D. No. 71 C 1009), the court has ruled that the resolution of the "intercity" versus "commuter" question may depend upon standing of the parties: ". . . the I.C.C.'s holding regarding this case should be forthcoming at about the same time that the U.S. Supreme Court will rule in the *Central of Georgia* case, *supra,* whether someone other than the U.S. Attorney General can bring a suit pursuant to Section 307 of the Amtrak Act, 45 U.S.C. 547, an issue also in our case. If indeed the Supreme Court rules that private parties are barred by Section 307 from bringing suit then this entire proceeding will be rendered moot." (Marovitz, J., Memorandum Opinion, dated July 13, 1973.)

large number of lawsuits designed to delay or defeat Amtrak's curtailment or elimination of service, particularly "in view of the approaching substantial train discontinuances expected after July 1, 1973". (U.S.A. Memo, p. 6).

This Court granted a writ of certiorari on May 14, 1973. 411 U.S. 981.

Rail Passenger Service Act of 1970

Various committees of the U.S. Congress held extensive hearings during the 1959-70 period concerning railroad passenger train service. Transportation Act of 1958,[7] which enacted section 13a of the Interstate Commerce Act, 49 U.S.C. 13a, greatly liberalized train discontinuance procedures by which railroads could terminate passenger service. One result was considerable dissatisfaction with the rulings of the I.C.C. on the part of members of the Congress, and a move toward new legislation.[8]

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[7] 72 Stat. 571.

[8] For example, see: Hearings on S. 1331, *Amendments to the Transportation Act of 1958 (Train Discontinuance)*, before the U.S. Senate Surface Transportation Subcommittee (1959); Hearing on S. 1161, *Train Discontinuances*, before the U.S. Senate Committee on Commerce, Ser. 63 (1963); Hearings on S. 325, *The Crisis in Passenger Train Service*, before the U.S. Senate Committee on Commerce, Ser. 89-11 (1965); Hearing on S. Res. 284, *Passenger Train Discontinuances*, before the U.S. Senate Surface Transportation Subcommittee, Ser. 89-76 (1966); Hearings on H.R. 7004, *Passenger Train Abandonment*, before the U.S. House Subcommittee on Transportation and Aeronautics, Ser. 90-4 (1967); Hearings on S. 1175, *Passenger Train Service*, before the U.S. Senate Subcommittee on Surface Transportation, Ser. 90-17 (1967); Hearings on H.R. 18212, *Railroad Passenger Train Service*, before the U.S. Senate Subcommittee on Transportation and Aeronautics, Ser. 90-46 (1968); Hearing on S. 2711, *Passenger Train Discontinuance–30-Day Notice*, before the U.S. House Committee on Interstate and Foreign Commerce, Ser. 90-23 (1968); Hearings on S. 3861, *Study of Essential Railroad Passenger Service*, before the U.S. Senate Subcommittee on Surface Transportation, Ser. 90-81 (1968); Hearings on S. 674, *Passenger Train Service Legislation*, before the U.S. Senate Subcommittee on Surface Transportation, Ser. 91-37 (1969); Hearings on H.R. 12084, *Passenger Train Service*, before the U.S. House Subcommittee on Transportation and Aeronautics, Ser. 91-31 (1969).

The legislation ultimately adopted originated in 1970 as the individual views of Senator Prouty, appended to a committee report of the U.S. Senate Committee on Commerce, which report had recommended a different bill.[9] The only hearings on the specific bill that became law were held briefly by the U.S. House Subcommittee on Transportation & Aeronautics of the Committee on Interstate & Foreign Commerce, on June 2, 3, and 4, 1970.[10]

The impetus for legislation quickened from a rapidly deteriorating situation, whereby the I.C.C. was approving numerous train discontinuances. Pending during the summer of 1970 was Penn Central's proposal to terminate virtually all of its long-distance east-west passenger train service, extending from St. Louis, Mo. and Chicago, Ill. on the west, to Boston, Mass., New York, N.Y. and Washington, D.C. on the east, embracing such intermediate points as Indianapolis, Ind., Cincinnati and Cleveland, Ohio, Detroit, Mich., Pittsburgh, Pa., and Buffalo, N.Y. The I.C.C. conducted hearings at 35 points along Penn Central's lines. In a lengthy report served September 30, 1970, the agency approved a substantial cut-back in Penn Central's service, and indicated that further reductions might be forthcoming. *Penn Central Transportation Co. Discontinuance*, 338 I.C.C. 380.

The U.S. House Committee on Interstate & Foreign Commerce reported H.R. 17849 on October 7, 1970.[11] The bill was rushed through and passed by both the House and Senate

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[9]Rept. No. 91-765, 91st Cong., 2d Sess. (1970).

[10]Supplemental Hearings on H.R. 17849, Ser. No. 91-62 (1970).

[11]H. Rept. No. 91-1580, 91st Cong., 2d Sess. (1970).

on October 14, 1970, the final day before adjournment, and was approved October 30, 1970 by the President.[12]

The purpose of H.R. 17849 was stated in the committee report:

> PURPOSE
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> The basic purpose of this bill is to prevent the complete abandonment of intercity rail passenger service and to preserve a minimum of such service along specific corridors. This is to be accomplished by creating a National Railroad Passenger Corporation which would be responsible for providing all intercity rail passenger service. All railroads would be eligible to join the corporation, and those which join would be relieved of further responsibility to provide passenger service. The corporation would be expected to revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking, particularly with new equipment or advanced vehicles. The overriding purpose of this legislation is to preserve and promote intercity rail passenger service and it is neither a duplication of, nor a substitute for, any other program (private or Federal) directed toward the urgently needed solutions of surface transportation problems.

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[12]The Penn Central discontinuances were temporarily stayed by a three-judge district court in early October, 1970, and the action thereafter dismissed as moot after the President signed the legislation on October 30, 1970, for the new Act had an effect on pending proceedings in courts. 45 U.S.C. 642. See: *Baker v. Pennsylvania*, 400 U.S. 875 and 401 U.S. 902.

Rail Passenger Service Act of 1970 placed an immediate moratorium on all train discontinuances until May 1, 1971 at the earliest. The Act authorized creation of a National Railroad Passenger Corporation (Amtrak), to provide intercity rail passenger service. On or before May 1, 1971, and between March 1, 1973 and January 1, 1975, Amtrak is authorized to tender a contract to a railroad to relieve the latter of its entire responsibility for the provision of intercity rail passenger service. Railroads contracting with Amtrak were authorized to discontinue all of their intercity rail passenger service on May 1, 1971, subject to giving the public 30 days' notice.[13] Railroads electing not to contract with Amtrak may not discontinue any intercity service until January 1, 1975, and may do so thereafter under the provisions of section 13a of the Interstate Commerce Act.[14]

The Act provides that Amtrak until July 1, 1973 must provide a minimum level of service, prescribed within 90 days of enactment by the U.S. Secretary of Transportation, and known as the "basic system".[15] However, Amtrak is authorized to provide service in excess of that prescribed for the basic system on its own initiative. Any such additional service provided for a continuous period of two years shall be designated part of the basic system.[16]

Discontinuances under the Act

The U.S. Secretary of Transportation on January 28, 1971, issued his final report designating the basic system, which specified those points between which intercity passenger trains shall be operated. 45 U.S.C. 521, 522. The Secretary specified 21 city-pairs. The level of service is to be at least one daily train

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[13] 45 U.S.C. 561.

[14] 45 U.S.C. 564.

[15] 45 U.S.C. 521, 522, 564(b)(1).

[16] 45 U.S.C. 563(a).

in each direction—a total of 42 trains—unless patronage and other factors indicate that daily frequency is not warranted.[17]

Amtrak was incorporated on March 30, 1971.[18] Most railroads opted to contract with Amtrak, and they posted notices proposing to discontinue some 527 intercity trains effective May 1, 1971.[19] This large number of trains came as a surprise to many, as it was generally understood that there were far fewer intercity trains in existence. Amtrak's Chairman, David W. Kendall, testified before the U.S. Senate Subcommittee of the Committee on Appropriations on April 6, 1971, that there were 360 intercity trains operated in 1970.[20] Secretary of Transportation John A. Volpe testified before the U.S. House Committee on Interstate & Foreign Commerce on April 22, 1971, that there were 366 trains in operation in 1970.[21]

Various actions were instituted, predicated upon allegations that the railroads had included numerous "commuter" trains in their "intercity" discontinuance notices to become effective May 1, 1971.[22]

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[17]The full text of the report is reproduced in Hearings on H.R. 709, *Review and Refunding of Rail Passenger Service Act*, before U.S. House Subcommittee on Transportation & Aeronautics, Ser. No. 92-53, at pp. 149-244 (1971).

[18]The articles of incorporation and by-laws as of May 4, 1971, are reproduced in Hearings on *Administration's Request for Additional Funding for Amtrak*, U.S. Senate Subcommittee on Surface Transportation, Ser. No. 92-29, at pp. 377-423 (1971). Penn Central owns approximately 55 percent of Amtrak's common stock. Id. at pp. 588-90.

[19]Ibid. at p. 549.

[20]Hearings on *Second Supplemental Appropriations for Fiscal Year 1971*, U.S. Senate Subcommittee of the Committee on Appropriations, 203 (1971).

[21]Footnote 17, *supra*, at p. 145.

[22]Some of these are set forth in the opinion below. (SA 54, fn. 27). Upon reference from a district court, the I.C.C. found that 44 passenger trains and 7 buses, contained in Penn Central's May 1, 1971 notice, did not constitute "intercity rail passenger service". *Penn Central Transp. Co.-Status of Passenger Serv.*, 338 I.C.C. 621 and 338 I.C.C. 690 (1971). The U.S. Attorney General is resisting the implementation of this decision on

Amtrak commenced operations on May 1, 1971 with 184 trains, considerably in excess of the 42 trains prescribed for the basic system.[23] These additional trains could be discontinued at any time by Amtrak, and some, in fact, were discontinued.[24] 45 U.S.C. 564(b)(2). However, those additional trains which have been continuously operated for a two year period become part of the basic system pursuant to the Act, 45 U.S.C. 563(a), and a basic system train cannot be discontinued by Amtrak prior to July 1, 1973. Any discontinuance by Amtrak of basic system service must be according to the procedures of section 13a of the Interstate Commerce Act. 45 U.S.C. 564(b).

Amtrak on July 2, 1973 filed section 13a(1) notices with the Interstate Commerce Commission, proposing to discontinue its important Chicago-Florida, New York-Kansas City, and Richmond-Newport News trains. The I.C.C. instituted an investigation into the proposed train discontinuances, and has ordered continued operation pending hearing and decision in its investigations.[25] Amtrak, on August 31, 1973, withdrew the notices for its New York-Kansas City and Chicago- Florida trains.

The initial three years since enactment of Rail Passenger Service Act of 1970 thus far have witnessed an overall decline in

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the ground of standing. No. 71-2301 (E.D. Pa.), *Commonwealth of Pennsylvania, et al. v. Baker, et al.*.

[23]Hearings on *Second Supplemental Appropriations for Fiscal Year 1971*, U.S. Senate Subcommittee of the Committee on Appropriations, 168-69 (1971).

[24]The situation in *Wood v. National Railroad Passenger Corp.*, 341 F.Supp. 908 (D. Conn. 1972), is one such example.

[25]Finance Docket No. 27436, *National Railroad Passenger Corporation (Amtrak)–Discontinuance of Trains Nos. 30 & 31, 530 & 531–Between New York, New York/Washington, D.C., and Kansas City, Missouri (National Limited)*; Finance Docket No. 27437, *National Railroad Passenger Corporation (Amtrak)–Discontinuance of Trains Nos. 52 & 53 Between Chicago and St. Petersburg/Miami, Florida (The Floridian)*; and Finance Docket No. 27438, *National Railroad Passenger Corporation (Amtrak)–Discontinuance of Train Nos. 98 and 99 Between Newport News and Richmond, Virginia, (The George Washington/ James Whitcomb Riley)*. The first two orders were entered July 20, 1973, and the third order was entered August 9, 1973.

the amount of train service available to the public.

SUMMARY OF ARGUMENT

The Court of Appeals sustained the right of respondent passenger association to sue to prevent the discontinuance of particular train service alleged to be in violation of Rail Passenger Service Act of 1970. We rely upon the exhaustive opinion of the Court of Appeals, without again tracking all of the reasons set forth in its brilliant 34-page opinion as to why standing to sue should be accorded. This answering brief is primarily devoted to new contentions advanced by Amtrak and the railroads in this Court.

Rail Passenger Service Act of 1970 was rushed through the U.S. Congress in the final days before adjournment—passing both chambers on the final day—in the face of threatened massive passenger train discontinuances by the nation's largest railroad which had been approved by the I.C.C. and which were likely to be implemented immediately.

Section 307 of the Act says that the Attorney General, employees and labor representatives, may sue Amtrak or any railroad to enjoin actual or threatened violation of the "policies and purposes" of the Act, but section 307 does not say that *only* these parties may bring suit to enjoin a violation of the specific provisions of the statute.

1. The statutory language was not an attempt to *bar* other parties from access to the courts, but merely to *authorize* the Attorney General to enforce certain rights which otherwise might be private rights. With respect to railway labor, Congress may have intended special standing since railway labor was not in the primary class to be protected by the Act.

2. The legislative history sustains the right of review. Contrary to the constrained interpretation of the role and function of the U.S. Secretary of Transportation in drafting the legislation, advanced by petitioners, the House subcommittee did not pattern section 307 upon the exact recommendations of that official. When Congress wished to bar access to the courts, as in section 202 of the Act, it did so explicitly.

3. Allowing aggrieved persons access to the courts would assist in carrying out the will of Congress. Congress has specifically legislated that train discontinuances are to be subject to customary discontinuance procedures, which procedures include access to the courts, so that standing to sue for unlawful discontinuances would effectuate the legislative design. The Attorney General has not instigated or participated in any actions other than in defense of Amtrak and the railroads. Standing for passenger associations is necessary if the purposes of Congress are to be achieved.

4. Contentions that the federal judiciary lacks jurisdiction are without merit. This case is clearly distinguishable from *Switchmen's Union v. Board*, 320 U.S. 297. A cause of action arises from a violation of the provisions of the Act which may be instituted by the persons intended to be protected by the Act.

ARGUMENT

I. THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 307 SUPPORT ACTIONS AGAINST AMTRAK OR A RAILROAD.

Rail Passenger Service Act of 1970 was rushed through the Congress to meet an emergency situation. There is a presumption that Congress did not desire to extinguish conventional judicial review in such circumstances. (SA 28).

A. *Statutory Language.* The statutory language of section 307 does not mean that persons other than the U.S. Attorney General are precluded from instituting an action for a violation of the Act in non-labor situations, contrary to petitioners' contentions. (Pet. Br., pp. 12-14) The opinion of the Court of Appeals more than adequately deals with this argument, which argument is based upon an erroneous application of the *expressio unius est exclusio alterius* maxim. (SA 28-34).

The provision for standing for the Attorney General does not bar other parties from access to the courts, but merely authorizes the Attorney General to institute suits. This is understandable because Amtrak is a quasi-public corporation heavily funded by the public treasury. The authority of the Attorney General extends to injunctions against actual or threatened violation of the "purposes and policies" of the Act, which is far beyond an ordinary private suit, and far beyond what otherwise might be private rights, thus suggesting that section 307 provides for suits by the Attorney General in addition to the ordinary private action contemplated by aggrieved persons.

The inclusion of employees or labor organizations in section 307 is likewise understandable, since the Congressional findings and declaration of purpose relate to the "traveler in America" without mention of labor or labor-management relations, 45 U.S.C. 501, so that Congress could have intended that labor might need special protection. Clearly, it cannot be inferred from the statutory language that Congress intended to bar other persons from instituting suit.

B. *Legislative History*. The legislative history of the Act does not support petitioners' argument that the House committee's unexplained refusal to adopt an amendment proposed in Subcommittee by railway labor—while at the same time making full provision for railway labor[26]—means that Congress intended to exclude other parties from the courts. As noted by the Court of Appeals, analysis of the matter does not begin from a neutral posture, but from a presumption in favor of access to the courts. (SA 28). Section 307 does not say that *only* the Attorney General may institute an action in a

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[26] Railway labor offered an amendment to section 307 in the House subcommittee so as to include sanctions against "any railroad" as well as against Amtrak, and to allow suits "by any person adversely affected or aggrieved thereby, including the representatives of the employees or any railroad or of the corporation." As reported from the House committee, and enacted, section 307 mentions suits against "any railroad" and suits by "any employee affected thereby, including duly authorized employee representatives." See: Supp. Hearings on H.R. 17849, at pp. 122, 141-42.

non-labor situation, a point of importance in the two reported district court opinions on the issue. Cf. *Wood v. National Railroad Passenger Corp.*, 341 F.Supp. 908, 911 (D. Conn. 1972); *Congress of Railway Unions v. Hodgson*, 326 F.Supp. 68, 78 (D.C. 1971).

As with its treatment of the statutory language, we believe the opinion of the Court of Appeals is quite adequate on this score also. (SA 34-39).

Now, for the first time, Amtrak and the railroads advance the contention that an intention by Congress to exclude private parties from the courts may be inferred by "acceptance of an Executive Branch recommendation" made by "the administrative officer charged with administration of the Act", in this case the U.S. Secretary of Transportation, John A. Volpe. (Pet. Br., pp. 16, 18).

1. *Role of Executive Branch in Final Bill.* Amtrak and the railroads assert that the House committee redraft of section 307 and the bill as finally enacted are in "exact conformity" with Secretary Volpe's recommendations; that Congress carefully adopted . . . the suggested amendment which Secretary Volpe "endorsed", rejected the specific portion he "opposed" . . . and instead "adopted" his "alternative formulation" and his "counterproposal". (Pet. Br., pp. 15-19)

Amtrak and the railroads are mistaken regarding Secretary Volpe's role in the legislative drafting. The record does not show that any specific language was forwarded by Secretary Volpe; nor does the record indicate that his supplemental views were requested. Rather, on June 18, 1970, the Secretary sent a letter to the Subcommittee with his comments on various amendments proposed by National Association of Regulatory Utility Commissioners, Association of American Railroads, and railway labor. These comments embraced ten sections of the Act. Amtrak and the railroads reproduce the first paragraph of Secretary Volpe's comments on labor's proposed amendment to

section 307 (Pet. Br., p. 15), but have not reproduced the very next paragraph, which reads:[27]

> With respect to inclusion of all railroads within the reach of the section, it should be noted that existing statutes apply to them. To an extent the Corporation is exempt from such statutes or statutory requirements. Consequently, I am not sure that it would be necessary to make sanctions applicable to any railroad. This is particularly so here where such sanctions expressly reach "any action, practice, or policy". The Corporation has a quasi-public character in many respects and the scope of the sanctions with respect to it is appropriate. There is no comparable situation, however, with respect to railroads generally.

It is abundantly clear from the above that the House committee redraft was nowhere in "exact conformity" with Secretary Volpe's recommendations, as the House committee and Congress included the provision for "all railroads" in section 307.[28] Congress did not adopt the amendment which he "endorsed" and reject the portion he "opposed", or adopt his "alternative formulation", etc. Nowhere are we able to find that Secretary Volpe changed his mind with respect to inclusion of "all railroads" in section 307. Amtrak and the railroads have simply misapprehended the legislative facts as we understand those facts.

2. *Role of Secretary of Transportation in Administration of the Act.* In addition to a misapprehension as to the relationship between Congress and the Secretary of Transportation with regard to legislative drafting, Amtrak and the railroads also err in placing the Secretary of Transportation as "the administrative officer statutorily charged with administration of the act." (Pet. Br., p. 18) The principal

[27] Supp. Hearings on H.R. 17849, at p. 85.

[28] At one point Amtrak and the railroads say that Secretary Volpe "stated that he did not object to that portion of the proposed amendment which would allow suits against railroads as well as Amtrak" (Pet. Br., p. 15), whereas elsewhere it is said that the Secretary "acquiesced" in certain aspects of labor's proposed amendment. (Pet. Br., p. 10) We believe both characterizations miss the mark.

function of the Secretary of Transportation was completed before Amtrak was even incorporated. That function was to prescribe the basic system of minimum intercity rail passenger service which Amtrak must operate for the minimum period of 26 months between May 1, 1971 and July 1, 1973.

The Secretary of Transportation is not in complete charge of administration for the Act, but shares such responsibility with the Interstate Commerce Commission. For example, the I.C.C. decides disputes between Amtrak and railroads regarding the initial payments for the privilege of terminating all passenger service, 45 U.S.C. 561(a)(3);[29] contracts between Amtrak and railroads regarding service for Amtrak, 45 U.S.C. 562;[30] discontinuance notices, 45 U.S.C. 561(a)(1);[31] discontinuance of trains in the basic system by Amtrak or discontinuance of trains by non-contracting railroads, 45 U.S.C. 564;[32] disputes between Amtrak and the railroads concerning reimbursement for employee pass privileges, 45 U.S.C. 565(f);[33] and adequacy of service, 45 U.S.C. 641.[34] In addition, the I.C.C. has primary jurisdiction to determine whether a given train provides "intercity rail passenger service."[35] Of course, certain functions of the Act are entrusted to the Secretary of Labor, 45 U.S.C. 565; the Secretary of the Treasury, 45 U.S.C. 602, 622; and the Comptroller General, 45 U.S.C. 645.

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[29] *Losses Under the Rail Passenger Service Act of 1970*, 343 I.C.C. 379 (1972).

[30] F.D. No. 27353, *Baker, et al.-Compensation for Passenger Service* and F.D. No. 27353 (Sub-No. 1), *Determination of Compensation Under Section 402(a) of the Rail Passenger Service Act of 1970.* (Mimeo, June 22, 1973).

[31] 36 Fed. Reg. 5219, 5220 (March 18, 1971); 49 C.F.R. 1122.9.

[32] Footnote 25, *supra.*

[33] F.D. No. 27194, *Determination of Cost Reimbursement Under Section 405(f) of the Rail Passenger Service Act, as Amended* (Mimeo, Dec. 18, 1972).

[34] Ex Parte No. 277 (Sub-No. 1), *Adequacy of Intercity Rail Passenger Service* (pending).

[35] A number of these cases are set forth in the opinion below. (SA 54, fn. 27).

3. *Reports to Congress.* Amtrak and the railroads attach as Exhibit A to their brief, the March 15, 1973 report by the U.S. Secretary of Transportation to the U.S. Congress.[36] This report was mandated by a 1972 amendment to the Rail Passenger Service Act of 1970, and is a one-time report.[37] In the normal administration of the Act, the Secretary of Transportation and the Interstate Commerce Commission submit simultaneous reports (or, in their discretion, a joint report) on March 15 of each year.[38] The I.C.C. issued a report under the earlier version of section 308(b) of the Act,[39] which was far more comprehensive than the report of the Secretary of Transportation.[40]

4. *Absence of Exclusionary Terms.* Clearly, the unexplained failure of a Congressional committee to adopt a proposed amendment is not dispositive. When Congress wanted to exclude judicial review in Rail Passenger Service Act of 1970, it expressly said so, as in Section 202 of the Act, where it precluded judicial review of the basic system prescribed by the U.S. Secretary of Transportation. 45 U.S.C. 522.[41]

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[36]This report is reproduced in Hearings on H.R. 8351, *Financial Assistance to Amtrak*, before U.S. House Subcommittee on Transportation and Aeronautics, Ser. No. 93-22, at pp. 71-181 (1973).

[37]45 U.S.C. 646. Section 12 of P.L. 92-316. See: H. Rept. No. 92-905 and H. Rept. No. 92-1111 (1972). 86 Stat. 227.

[38]45 U.S.C. 548(c). P.L. 92-316 amended the earlier obligation for the submission of reports biennially on October 30. 86 Stat. 227.

[39]The I.C.C.'s report is reproduced in hearings on *Administration's Request for Additional Funding for Amtrak*, U.S. Senate Subcommittee on Surface Transportation, Ser. No. 92-29, at pp. 533-805.

[40]Id. pp. 806-850.

[41]"The basic system as designated by the Secretary shall become effective for the purposes of this Act upon the date that the final report of the Secretary is submitted to Congress and shall not be reviewable in any court."

Amtrak and the railroads suggest that, Congress having withdrawn the prescription of the basic system from judicial review, it would be anomalous for Congress to provide the public with the "equally effective" method of enjoining train discontinuances by allowing suits to enjoin discontinuances. (Pet. Br., p. 20)

The comparison is invalid. The discontinuance by Amtrak of "basic system" trains after July 1, 1973,[42] is expressly made subject to the procedures of section 13a of the Interstate Commerce Act. 45 U.S.C. 564(b)(3). This court has upheld the right of the public to obtain judicial review of section 13a(1) investigations which permit train discontinuances. *City of Chicago v. United States*, 396 U.S. 162 (1969). Even the U.S. Secretary of Transportation, in his March 15, 1973 report, has recognized that the present law authorizes suits to enjoin the discontinuance of "basic system" trains. See: Exhibit A to Petitioners' Brief, at pp. 104-105 and 107-108.

Thus, great significance should be accorded the express exclusion of judicial review in section 202, in contrast with the absence of exclusionary language in section 307. Cf. *Wood v. National Railroad Passenger Corp., supra*, 341 F.Supp. at 911.

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[42] "Basic system" service presently includes far more than the initial 42 trains prescribed by the Secretary of Transportation on January 28, 1971, because additional intercity rail passenger service, voluntarily operated by Amtrak for a continuous period of two years, becomes part of the basic system by virtue of Section 403(a) of the Act. 45 U.S.C. 563(a).

II. ACCESS TO THE COURTS BY THE PUBLIC WOULD ASSIST IMPLEMENTATION OF THE ACT.

The purposes of the Act would be enhanced if the public is permitted access to the courts to enjoin violations of the Act, as it would make more certain that there will be compliance with the Act. Amtrak and the railroads have nothing to fear if they act lawfully. Yet they urge that the decision of the Court of Appeals would "seriously frustrate" the fundamental purposes of the Amtrak act (Pet. Br., p. 21).

The thrust of the argument made by Amtrak and the railroads primarily concerns the prospective discontinuance by Amtrak, after July 1, 1973, of certain long-distance trains.[43] They argue that injunctive relief—even a single preliminary injunction—could disrupt Amtrak's operations (Pet. Br., pp. 21-29). The short answer is that Congress intended to allow review of train discontinuances, including access to the courts, and this is acknowledged by the U.S. Secretary of Transportation in his March 15, 1973 report, where he proposes certain amendatory legislation.[44] Any question of injunctive relief, *pendente lite*, is a matter for the courts. Amtrak would have every opportunity to present its case in opposition to the issuance of any injunction.

Amtrak recently posted discontinuance notices for three important long-distance trains. These discontinuances were suspended by the Interstate Commerce Commission.[45] Although two of the notices were withdrawn, they can be renewed at a later date. Petitioners appear horrified at the

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[43]The United States, in its Memorandum as Amicus Curiae, supporting the request that certiorari be granted, expressed concern for the same prospective train discontinuances after July 1, 1973. (U.S.A. Memo, p. 6).

[44]Exhibit A to Petitioners' Brief at pp. 104-105 and 107-108. Section 404 of the Act, 45 U.S.C. 564, provides that trains in the basic system may be discontinued after July 1, 1973, under the procedures of section 13a of the Interstate Commerce Act. The "basic system" presently includes most of Amtrak's intercity service.

[45]Footnote 25, *supra*.

possibility the discontinuance of the New York-Kansas City train may encounter stiff opposition from the public.[46] To preclude effective judicial review of the Commission's ultimate decisions in these cases—as petitioners would desire—would run directly counter to *City of Chicago v. United States*, 396 U.S. 162 (1969), and would require additional legislation. There is no showing that Congress intended to take away the right of the public to contest train discontinuances by enactment of Rail Passenger Service Act of 1970.

Amtrak and the railroads also point to three cases involving the discontinuance of trains by Amtrak which were not part of the basic system. (Pet. Br., pp. 25-26). We consider these to be *de minimis* and, in any event, Amtrak has nothing to fear if it acts within the law.

The United States points to a fourth action, where the Commonwealth of Pennsylvania and State of New Jersey seek to enforce the I.C.C.'s determination that some 44 trains and 7 buses do not provide "intercity rail passenger service", as claimed by Penn Central and Amtrak.[47] The Department of Justice opposes these States on the ground that they lack standing under section 307 of the Act.

We note that the Attorney General has never instigated or participated in litigation other than in defense of Amtrak and the railroads. This was observed by the court below (SA 42):

> "Indeed, appellees in this case have been unable to refer us to a single instance in which the Attorney General has either instigated or participated in litigation under the Amtrak Act, except for a few cases brought by other parties in which he intervened solely to support the defense that parties other than labor and the Attorney General did not have standing to sue. *Cf. Allen v. State Board of Elections*, supra, 393 U.S. at 566 n. 22. To rely on the Attorney

[46]The New York-Kansas City train mentioned by petitioners (Pet. Br., pp. 24-26) was before the I.C.C. in F.D. No. 27436. See footnote 25, *supra*. Amtrak withdrew its notice on August 31, 1973.

[47]U.S.A. Memo, p. 6. See: *Penn Central Transp. Co.-Status of Passenger Serv.*, 338 I.C.C. 621 and 338 I.C.C. 690.

> General as the sole source of litigation under the Act, as he would be in cases where labor's interests were not adversely affected, is thus to rest enforcement of the entire regulatory scheme on the Attorney General's virtually unreviewable distinction between a mere 'technical' violation and one that seriously interferes with the legislative purpose." (Footnote omitted)

The U.S. Attorney General cannot be relied upon to be the exclusive person (in non-labor cases) with standing to sue. Respondent, National Association of Railroad Passengers, has been unable to interest the Attorney General to institute suit in the instant or in any other violation of the Act. The court observed in *Wood v. National Railroad Passenger Corp.*, 341 F.Supp. 908, 912 (D. Conn. 1972), that the refusal of the Attorney General to act is reviewable only under a very limited standard:

> "It should also be noted that if the Attorney General refuses to act, his discretion, if reviewable at all, would be reviewable only under a very limited standard. *Cf. Littell v. Morton*, 445 F.2d 1207, 1211 (4th Cir. 1971); *Fook Hong Mak v. Immigration & Naturalization Serv.*, 435 F.2d 728 (2d Cir. 1970). The practical effect of his refusal would be to cloak Amtrak and the railroads with governmental immunity. I am reluctant to think Congress intended such a result. Nor is there any indication that the purpose of Congress was to protect the courts against the possibility that they would become over-burdened with increased litigation."

We are unaware of any "Amtrak Section" within the Department of Justice, as claimed by Amtrak and the railroads, to monitor the Amtrak program. (Pet. Br., pp. 28, 29, fn. 31, 35). We know of only one attorney who handles Amtrak matters, and this appears as part of his larger duties concerning the Penn Central reorganization and other railroad reorganizations in the Northeast.[48]

[48]The Dept. of Justice did not appear below. Rather, it sent a letter to Amtrak's counsel authorizing him to bring the Department's position to the attention of the court. (Pet. for Cert., App. E).

There is serious doubt whether section 307 authorizes the U.S. Attorney General to sue for a technical violation of the Act.[49] The Court of Appeals observed that the Attorney General has advised that he has no power under the Act "to sue for a construction of the Act or to enjoin a purely technical violation." (SA 42).

The Attorney General's letter is an Appendix hereto. Amtrak and the railroads elsewhere point to the similarity between section 307(a) and section 403(a) of the Communications Satellite Act of 1962, 47 U.S.C. 743(a). (Pet. Br., pp. 36-37). But the phrase, "*or if the corporation or any other person shall violate any provision of this Act,*" was deleted when the Amtrak section was enacted.[50]

Amtrak suggests that appeals to Congress can be a substitute for court review of train discontinuances. (Pet. Br., p. 28). If this were true, there would be no need for a judicial system in the United States.[51]

We would be remiss if we did not express strong disagreement with some of the seemingly favorable comments which Amtrak extracts about itself from the March 15, 1973 report by the U.S. Department of Transportation to the Congress, concerning Rail Passenger Service Act of 1970, and which Amtrak attaches as an exhibit to its brief here. (Pet. Br., pp. 21-23, fn. 20-22; p. 24, fn. 24). In actual fact, the Department recommends a 14 percent slash in Amtrak's train miles to be operated during the coming fiscal year, which would result in a projected 3 percent decline in passenger miles. This recommendation for further train discontinuances is made in the face of an 11 percent *increase* in passenger miles experienced in the period May-November 1972, over the

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[49] See Opinion below. (SA 42).

[50] The compiler for the U.S. Code has entitled section 403(a), "Sanctions-Petition of the Attorney General for Equitable Relief; venue."

[51] Amtrak has taken the testimony of respondents' President (now chairman) out of context. (Pet. Br., p. 28, fn. 30). Mr. Haswell's remarks were directed to whether some other federal agency should have control over Amtrak's quality of service, and had no relation whatsoever to Section 307. Supp. Hearings on H.R. 17849, at pp. 177-78 (1970).

comparable period in 1971.[52]

Respondent, National Association of Railroad Passengers, has presented its own detailed statement to the Congress. It does not see enactment of Rail Passenger Service Act of 1970, and the creation of Amtrak, as intended to be a method for the orderly liquidation of all rail passenger service in the Nation outside the Northeast corridor. Respondent will not burden this court by making the text of its 74-page statement as to the status of passenger service, presented June 12, 1973 in hearings before a U.S. House Subcommittee, as an Exhibit to its brief.[53]

The decision below will enhance, rather than frustrate, the Congressional purposes of the Act. Judicial review of action taken by Amtrak or the railroads will act as a check upon the decisions of these corporations.

III. THE DECISION BELOW HAS A PROPER JURISDICTIONAL BASIS.

Amtrak and the railroads assert that the general jurisdictional provisions of Section 1337 of Title 28, U.S. Code, is superseded by the so-called specific provisions of section

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[52]Hearings on H.R. 8351, footnote 36, *supra*, at 86, 169. (Pet. Br., Ex. A, pp. 12, 98)

[53]The text is reproduced in full in Hearings on H.R. 8351, footnote 36, *supra*, at 230-304. Respondent's position is that Amtrak has not come to grips with fundamental problems—most of its services are deficient in quality and excessive in operating costs. Hearings on H.R. 8351, *supra* at 249. Amtrak's routes and services do not serve many large and important communities. Its Chicago-Los Angeles trains bypass the populous cities of southern Arizona, which are also important centers for winter vacationers, and its Chicago-San Francisco trains bypass the spectacularly scenic Colorado Rockies west of Denver. Id. at 249-50. Amtrak's on-time performance is mediocre and is worsening. The Chicago-New Orleans trains have *averaged* between 2 and 4 hours late, and those between Chicago and Carbondale, an hour late. Id. at 252-53. Some of the problem is with Amtrak's top management and directors, id. at 255-66, and a great deal of the difficulty is owing to non-cooperation by the railroads with whom Amtrak must contract for services, Id. at 264-76.

307(a) of Rail Passenger Service Act of 1970. (Pet. Br., pp. 29-30). The case citations are wholly inapplicable. They relate to situations where the specific provision pertained to all potential parties, or where the statutes are part of the same enactment.[54] In any event, the "specific" mention of jurisdiction for certain parties in section 307(a) cannot be meant, ipso facto, to exclude other parties who would qualify to invoke jurisdiction under section 28 U.S.C. 1337. As shown in connection with the language and history surrounding the specific mention of the Attorney General in section 307(a) of the Act,[55] there is no demonstrated intention by Congress to exclude the invocation of federal jurisdiction by other persons. Likewise, section 307(a) does not employ the term "exclusive", *Calhoun v. Harvey*, 379 U.S. 134, 137-41 (1964),[56] nor does the statute specify that the "Secretary of Labor *shall* bring all actions." *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir.), cert. den. 360 U.S. 930 (1959).[57]

This court made it clear in *Switchmen's Union v. Board*, 320 U.S. 297 (1943), that "special circumstances" must be present to defeat the general grant of jurisdiction. 320 U.S. at 300. Amtrak and the railroads argue that special "machinery" exists to settle disputes between competing interests. (Pet. Br., pp. 31-33). However, there is no such machinery for settling disputes between Amtrak and the public or, for that matter, for determining disputes between Central of Georgia Railway Company and railroad patrons over the discontinuance of the "Nancy Hanks", operating entirely within the State of Georgia. Of course, prior to enactment of Rail Passenger Service Act of 1970, the entire history of railroad discontinuances shows that administrative and judicial remedies were available to railroad

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[54](SA 43-47). Amtrak and the railroads assert that the Court of Appeals has constructed a novel theory which was never briefed below. (Pet. Br., pp. 29-30) In our view the entire section 1337 matter was thoroughly briefed below.

[55]*Supra*, at pp. 13-15.

[56]29 U.S.C. 482, 483.

[57]29 U.S.C. 211(a).

passengers. (SA 45, 48-49).[58] We fail to discern any clear command of the statute that these procedures were to be terminated. Indeed, most train discontinuances today are expressly made subject to the procedures existing under section 13a of the Interstate Commerce Act, 45 U.S.C. 564(b)(3), and this contemplates ultimate judicial review.

Moreover, Amtrak and the railroads are mistaken as to the extent of the "machinery". For example, the Secretary of Transportation is not required to solicit and consider the views of "interested persons" in prescribing the basic system, but only the views of the Interstate Commerce Commission, State commissions, railroads, and railway labor organizations, 45 U.S.C. 522;[59] Amtrak is exempt from all I.C.C. regulations with respect to rates, fares, charges, routes and service, and is not subject to any State or other law pertaining to the transportation of passengers as it relates to rates, routes or service, 45 U.S.C. 546(a)(c); and it is unclear whether the Attorney General is empowered to seek to enjoin a specific violation of the Act, in contrast with a violation of the policies and purposes of the Act, 45 U.S.C. 547.

The "machinery" of Rail Passenger Service Act of 1970 is obviously inadequate to substitute for access to the courts. The court in *Switchmen's Union* stated that if the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the general jurisdiction statutory provisions to be applicable. 320 U.S. at 300. See also: *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). We would add that the machinery is hardly neutral with respect to the Attorney General for, as Amtrak and the railroads recognize (Pet. Br., p. 35), the Attorney General operates in conjunction with the

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[58] Apart from Rail Passenger Service Act of 1970, discontinuance of the "Nancy Hanks" would be barred by section 93-307 of the Georgia Code, and Railroad Passenger Rule No. 18 of the Georgia Public Service Commission, without prior approval by the State agency.

[59] See: Hearing on *Administration's Request for Additional Funding for Amtrak*, before U.S. Senate Subcommittee on Surface Transportation, Committee on Commerce, Ser. No. 92-29, at pp. 255-267 (1971).

Department of Transportation in reviewing complaints about alleged violations of the Act. The Department is not, of course, a regulatory agency, as it functions in a promotional role with regard to Amtrak.

The second part of the jurisdictional argument advanced by Amtrak and the railroads is that the Act does not create a "private cause of action". (Pet. Br., pp. 34-36). The word "private" begs the question because admittedly a cause of action arises with respect to the policies and purposes of the Act on petition of the Attorney General or railway labor.

Rail Passenger Service Act of 1970 confers duties upon railroads and upon Amtrak. In particular, unless a railroad contracts with Amtrak, it may not discontinue its intercity rail passenger service. A legal duty is created and imposed upon non-contracting railroads in favor of passengers utilizing trains. The statute clearly aims to protect the railroad passenger, as indicated in the declaration of purpose, for example. 45 U.S.C. 501. Such a cause of action arises from a breach of the railroad's duty to the traveling public, and may be enforced by the class of the public intended to be protected. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

Petitioners next refer to the legislative history behind the sanctions section of Communications Satellite Act of 1962, which is termed "virtually identical" with section 307(a) of the Amtrak Act. See: 47 U.S.C. 743(a). However, there is no Congressional intent to bar suits against Comsat. The remarks of Senator Humphrey and Deputy Attorney General Katzenbach were directed to those who opposed creating any Communications Satellite Corporation, rather than to the question of standing to sue. See: 108 Cong. Rec. 14902 and 16697. Moreover, section 403(a) of the Comsat Act is not "virtually identical" with section 307(a) of the Amtrak Act, for the phrase, " *or if the corporation or any other person shall violate any provision of this chapter*" was not carried forward into the Amtrak statute. Finally, it is observed that there appears to have been no reported cases under section 403(a) of the Comsat statute.

Respondent must emphatically disagree with the final contention of Amtrak and the railroads that the record provides no basis for asserting that the Attorney General cannot or will not take appropriate action to terminate actual or threatened violations of the Amtrak Act. First, the Attorney General has on occasion asserted an absence of power "to sue for a construction of the Act or to enjoin a purely technical violation". Second, we know of no instance in which the Attorney General has participated in litigation other than to assert that the plaintiffs bringing the action lacked standing. (SA 42).

CONCLUSION

For the foregoing reasons, and those given by the court below, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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National Association of
Railroad Passengers

September, 1973

APPELLANT'S REPLY TO SUPPLEMENTAL MEMORANDUM, FILED SUPTEMBER 29, 1972, U.S.C.A. (SA 4)

ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

Department of Justice
Washington 20530

NOV 1 9 1971

Honorable John Slack
House of Representatives
Washington, D. C. 20505

Dear Congressman Slack:

Thank you for your letter of October 7, 1971 regarding the request that the Attorney General initiate proceedings pursuant to section 307(a) of the Rail Passenger Service Act of 1970, to compel the restoration of certain rail service discontinued by the Baltimore & Ohio Railroad.

As you know, we obtained the views and recommendation of the Department of Transportation, as that agency possesses expertise in the area of rail service and the position of passenger service by rail in the nationwide transportation network. The Department of Transportation has recommended that the Attorney General neither institute nor intervene in any litigation to compel the restoration of the service in question. After study of the Department of Transportation views, we concur in the determination of the Department of Transportation.

The B & O has discontinued the trains in question, claiming that they were intercity trains which might be lawfully discontinued under the Act.

The Act, in section 401(a)(1), allows member railroads to discontinue all intercity rail passenger service. "Intercity rail passenger service" is defined in section 102(5)(a) to specifically exclude "commuter and other short-haul service in metropolitan and suburban areas * * *."

As the Department of Transportation has pointed out to us, if the discontinued trains are in fact intercity trains, as the B & O contends, they of course may be discontinued. If they are commuter trains, the protection

and preservation of commuter trains is outside the statutory purpose of the Act. Congress, in section 101 of the Act, has clearly set forth the statutory purpose of the Act as "providing modern, efficient, intercity rail passenger service." All of the activities authorized by the Act and all the duties and responsibilities created by the Act relate to the retention of a network of intercity railroad passenger service only. Furthermore, the statutory mandate of section 307(a) does not give the Attorney General the authority to sue for a construction of the Act or to enjoin a purely technical violation.*/ Rather, the authority to sue is granted to protect and enhance the legislative purpose. Suit may be brought whenever AMTRAK or any other railroad:

> " * * * engages in or adheres to any action, practice or policy inconsistent with the policies and purposes of this act, refuses, fails, or neglects to discharge its duties and responsibilities under this act, or threatens any such violation, obstruction, interference, refusal, failure, or neglect * * * " [emphasis added]

The word "such" obviously refers to the same clause which empowers the Attorney General to protect the statutory purpose, as made explicit by section 101 of the Act.

Assuming arguendo that the trains are in fact commuter trains or are so held to be in the proposed litigation, the B & O might still seek to discontinue the service by filing discontinuance notices with the Interstate Commerce Commission pursuant to section 13(a)(1) of the Interstate Commerce Act. Therefore, it may be maintained that the proper forum

---

*/ Any suit to halt discontinuance would, at most, turn into a technical struggle over the inclusiveness of the statutory term "commuter train". Such a determination would serve no useful purpose and would not serve to enhance and protect the statutory scheme of the Act, which is the only mandate the Attorney General has thereunder.

in which to contest the discontinuance of a commuter train is the Interstate Commerce Commission. If the Commission then denies relief, the protestants may then have access to the courts with standing in their own right. However, the case is not a proper one for intervention by the Justice Department.

Please let me know if I may be of any further assistance.

Sincerely yours,

L. Patrick Gray III

L. PATRICK GRAY, III
Assistant Attorney General

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OCTOBER TERM, 1973

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION,
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AND SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE*

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Supreme Court of the United States

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---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

To: The Supreme Court of the United States

Pursuant to Supreme Court Rule 42(3), the National Association of Regulatory Utility Commissioners (NARUC) respectfully moves the Court for leave to file the brief, accompanying this motion, as *amicus curiae* in the above-entitled cause and shows:

Similarly, trains in the basic system which Amtrak proposes to discontinue after July 1, 1973 may not be discontinued if "State, regional, or local agencies request continuation of the service and within ninety days agree to reimburse the Corporation for a reasonable portion of any losses . . . ." 45 U.S.C., § 564(b)(3).

In addition, trains in the basic system [including those trains added to the original basic system in accordance with 45 U.S.C., § 563(a)], which Amtrak proposes to discontinue after July 1, 1973, cannot be discontinued unless the procedures of Section 13a of Title 49 are employed. 45 U.S.C., § 564(b)(3). Similar provision is made for proposed discontinuances by non-contracting railroads after January 1, 1975. 45 U.S.C., § 564(a). With certain exceptions not important here, Section 13a provides that railroads must apply to State Commissions for authority to effect discontinuances of intrastate trains, and must apply to the Interstate Commerce Commission for authority to discontinue interstate trains. In regard to decisions made by the I.C.C. in Section 13a proceedings, this Court has upheld the right of aggrieved parties, including State commissions, to appeal such decisions. *City of Chicago v. United States*, 396 U.S. 162 (1969).

The NARUC was permitted by this Court to file an *amicus curiae* brief in the *City of Chicago* case, *supra*.

The question, then, of the extent of access to the courts by parties aggrieved by violations of the Act by Amtrak or a railroad is of considerable importance to State regulatory commissioners across the country. The judicial landmark to be established by the Court in the disposition of this case will have a direct effect on the ability of State authorities to protect local interests in the development and maintenance of adequate rail passenger service.

Wherefore, it is respectfully submitted that this Court should grant leave for the filing of a brief by the National Association of Regulatory Utility Commissioners, as *amicus curiae*, in this case.

Dated this 4th day of September, 1973.

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BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 475 F.2d 325. The order of the District Court, issued on May 5, 1971, is unreported.

QUESTION PRESENTED

Does Section 307 of the Rail Passenger Service Act of 1970 (the "Amtrak Act") bar suits by injured and aggrieved parties to obtain equitable relief against the National Railroad Passenger Corporation and/or the railroads for violations of the Amtrak Act, other than suits instituted upon petition of the Attorney General of the United States or, in a case involving a dispute over a labor agreement, upon petition of an employee or duly authorized employee representative?

STATUTE INVOLVED

Involved in this case is Section 307 of the Rail Passenger Service Act of 1970, 84 Stat. 1333, the title of which, as enacted, differs from that presented in petitioners' brief. Section 307 of the Amtrak Act provides as follows:

> SEC. 307. SANCTIONS.
>
> (a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, obstructs or interferes with any activities authorized by this Act, refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon

petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this Act.

THE INTEREST OF THE NARUC AS *AMICUS CURIAE*

The NARUC is a quasi-governmental nonprofit organiza- founded in 1889. Within its membership are the governmental bodies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. The mission of the NARUC is to improve the quality and effectiveness of public regulation in America. More specifically, the NARUC contains State officials charged with the duty of regulating rail transportation within their respective States and, as such, they normally have the obligation to assure the establishment and maintenance of such rail transportation and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates and charges that are just and reasonable.

As indicated on pp. 8-10, *infra*, the Rail Passenger Service Act of 1970 considerably affected the traditional regulatory responsibilities of State authorities over rail passenger service. Certain provisions of the Act reduced the role of State authorities in regulating such service within their respective jurisdictions. See, *e.g.*, Sections 306(c) and 404(a) of the Act, 45 U.S.C., §§546(c) and 564(a).

Other provisions of the Act explicitly recognized the importance of continuing a strong role for State authorities in the regulation and development of rail passenger service in this country. See, *e.g.*, Section 202, 45 U.S.C., §522, concerning the designation of the basic system; Section 306(b), 45 U.S.C., §546(b), concerning the continuing applicability of State safety laws and regulations; Sections 403(b) and 404(b)(3), 45 U.S.C., §§563(b) and 564(b), concerning the options made available to State authorities to ensure the continuance of those trains which Amtrak proposes to discontinue; and the provisions [45 U.S.C., §§546(c), 564(a), 564(b)(3)] making discontinuances, once the basic system had been designated and established, subject, with minor modifications, to the more normal procedures of Section 13a of the Interstate Commerce Act.

Accordingly, the decision by the Court of the issues in this case will be of paramount regulatory importance and will have a substantial effect on the ability of State agencies to protect the public interest in the availability of intercity rail passenger service. Therefore, the members of the NARUC, as government regulators, are vitally concerned with these issues and the precedents which will be established by their resolution.

STATEMENT OF THE CASE

This is an action instituted by the National Association of Railroad Passengers (NARP) to enjoin the discontinuance of trains by the Central of Georgia Railway Company. The trains involved include the "Nancy Hawks" passenger train operated between Savannah and Atlanta, Georgia, and two trains operated between Albany, Georgia and Birmingham, Alabama. The National Association of Railroad Passengers,

respondents herein, charged that the proposed discontinuances violated Sections 404(a) and 802 of the Amtrak Act, 45 U.S.C. §§564(a) and 642, in that the discontinuances were not being implemented pursuant to a contract entered into between Southern Railway Company (Southern) and Amtrak in accordance with Section 401(a)(1) of the Act, 45 U.S.C., §561(a)(1), but rather pursuant to a contract between Amtrak and a subsidiary of Southern, the Central of Georgia Railway Company (Central).

The District Court below never reached the merits of the case, having dismissed the action on the ground that the NARP had no standing to maintain the action under Section 307 of the Act. On appeal, the United States Court of Appeals for the District of Columbia reversed and remanded the District Court's decision.

Rail Passenger Service Act of 1970

The Rail Passenger Service Act of 1970 was enacted amidst extensive concern across the country that rail passenger service was rapidly becoming a "thing of the past." Why such a development was occurring was subject of extensive debate at that time. In its Report accompanying H.R. 17849, the bill eventually enacted into the Rail Passenger Service Act of 1970, the Committee on Interstate and Foreign Commerce stated:

> Again it is emphasized that there are many reasons for the downward trend in passenger train usage. The railroads have been accused of downgrading service in a deliberate attempt to support elimination of passenger trains, the costs to the railroads have

> increased sharply. Our highly improved highway and air transportation services have made deep inroads into the rail passenger traffic. H.R. Rep. No. 91-1580, 91st Cong., 2nd Sess., p. 3 (1970).

Concerned, among other things, by the pollution caused by other modes of transportation,[1] Congress emphasized that the purpose of the bill was to save and promote rail passenger service, and also emphasized that State and local authorities would play a major role in such an effort:

> That is the intent of this bill. It envisions a completely new effort to save and promote rail passenger service. *The corporation, described in detail elsewhere in this report, will undertake the responsibility for providing the rail passenger service of the future, and it will be free to go beyond the original basic system, particularly where State, regional, or local authorities are willing to provide financial assistance for any deficits incurred for service which they desire.* Acting over a unified system the corporation should expect and achieve immediate improvements in such areas as ticketing and reservations. New equipment can be purchased, roadbeds improved, terminals modernized, and upgrading in the quality of service can be achieved. (See Secretary

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[1] "To solve the problems arising from the side effects of our several modes, such as pollution and congestion, we must preserve and improve the neglected and older form of railroad service." H.R. Rep. No. 91-1580, *supra*, p. 2.

> Volpe's testimony, Hearings *supra*, page 69). H.R. Rep. No. 91-1580, *supra*, p. 3. (Underscore supplied).

To the Congress, it appeared that curtailment of all rail passenger service was imminent. As the Committee on Interstate and Foreign Commerce stated:

> This nation is faced with the immediate threat of complete curtailment of rail passenger service. H.R. Rep. No. 91-1580, *supra*, p. 2.

During the summer of 1970, for example, such fears were buttressed by the proceeding before the Interstate Commerce Commission, in which the proposal by Penn Central to discontinue a large portion of its passenger train service was under investigation. The proposal was substantially approved in *Penn Central Transportation Co. Discontinuance*, 338 I.C.C. 380.

Congress faced the immediate threat by ordering a moratorium on all train discontinuances until at least May 1, 1971. Within thirty days after the passage of the Act (October 30, 1970), the Secretary of Transportation was required to prepare a preliminary report and recommendations for a basic system of intercity rail passenger service, and to submit such report to the Interstate Commerce Commission and Congress. Section 201, 45 U.S.C., §521. The I.C.C., State Commissions, and labor representatives were given only thirty days to review and comment upon the preliminary report, and the Secretary was required to submit a final report to Congress within ninety days of the passage of the Act. Section 202, 45 U.S.C., §522. If Amtrak entered into a contract, pursuant to Section 401 of the Act, 45 U.S.C., §561, with a railroad to

relieve it of responsibility for service prescribed for the basic system, Amtrak was forbidden to discontinue such service until at least July 1, 1973. Section 404(b), 45 U.S.C., §564(b). Railroads not entering into contracts with Amtrak to relieve them of responsibility for passenger service were forbidden to discontinue any service until at least January 1, 1975. 45 U.S.C., §564(a).

Furthermore, and very importantly in this case, Congress specifically provided that "The basic system as designated by the Secretary . . . shall not be reviewable in any Court." Section 202, 45 U.S.C., §522.

In the manner described above, Congress prevented the imminent from occurring, *i.e.*, "complete curtailment of rail passenger service" across the country. The preservation of a basic system was assured for nearly three years – October 30, 1970 to July 1, 1973; and the components of the basic system, as designated by the Secretary, were not to be contested in any court.

After assuring the maintenance of a basic system until at least July 1, 1973, Congress then made it abundantly clear that State and local authorities, among others, were to play a major role in the future development of the nation's rail passenger service. Amtrak, for example, was prohibited from discontinuing any trains in the basic system after July 1, 1973, whenever State, regional, or local agencies, after receiving notice of the proposed discontinuance, "request continuation of the service and within ninety days agreed to reimburse the Corporation for a reasonable portion of any losses associated with the continuation of service beyond the notice period." Section 404(b)(3), 45 U.S.C., §564(b)(3).[2]

---

[2] Section 404(b)(3) reads:

"Discontinuance of Service . . . (continued)

Similarly, concerning rail service in addition to that prescribed for the basic system, Amtrak is required to provide such service upon the request of, and appropriate reimbursement of a portion of the losses by State, regional, or local agencies. Section 403(b), 45 U.S.C., §563(b).[3] By a 1972 amendment to Section 403(a) [45 U.S.C., §563(a)] of the Act, the Corporation was directed to ". . . cooperate with State, regional, and local agencies to encourage the use of trains [outside of the basic system] and [to] make reasonable

---

[2] (continued)

(3) If at any time after July 1, 1973, the Corporation determines that any train or trains in the basic system in whole or in part are not required by public convenience and necessity, or will impair the ability of the Corporation to adequately provide other services, such train or trains may be discontinued under the procedures of section 13a of Title 49: *Provided, however,* That at least thirty days prior to any change or discontinuance, in whole or in part, of any service under this subsection, the Corporation shall mail to the Governor of each State in which the train in question is operated, and post in every station, depot, or other facility served thereby notice of the proposed change or discontinuance. The Corporation may not change or discontinue this service if prior to the end of the thirty-day notice period, State, regional, or local agencies request continuation of the service and within ninety days agree to reimburse the Corporation for a reasonable portion of any losses associated with the continuation of service beyond the notice period."

[3] Section 403(b) reads:

"New Service . . .

(b) Any State, regional, or local agency may request of the Corporation rail passenger service beyond that included within the basic system. The Corporation shall institute such service if the State, regional, or local agency agrees to reimburse the Corporation for a reasonable portion of any losses associated with such services.

efforts to assure high quality of customer services." See Section 6, Public Law 92-316, 86 Stat. 229.

Disagreements between Amtrak and State and local authorities as to the extent of reimbursement to be paid by those authorities for the continuance of trains in or beyond the basic system are to be referred to the Secretary of Transportation for decision. 45 U.S.C., §§563(c), 564 (b)(4).

In addition, proposed discontinuances by Amtrak of trains in the basic system after July 1, 1973, were explicitly made subject to the procedures of section 13a of the Interstate Commerce Act (49 U.S.C., §13a), as were any proposed discontinuances, after January 1, 1975, by railroads which had not entered into contracts with Amtrak pursuant to 45 U.S.C., §561(a)(1). See Sections 404 (a) and 404(b)(2) of the Act, 45 U.S.C., §§564(a), 564 (b)(2).

ARGUMENT

I.

ANALYSIS OF THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 307 DOES NOT LEAD TO A CONCLUSION THAT CONGRESS *CLEARLY* INTENDED TO BAR SUITS AGAINST AMTRAK AND THE RAILROADS, FOR VIOLATIONS OF THE ACT, BY PARTIES OTHER THAN EMPLOYEES, THEIR REPRESENTATIVES, OR THE ATTORNEY GENERAL.

The Court below, in a thorough and exhaustive analysis of the language and legislative history of Section 307, rejected petitioners' contentions that Section 307 clearly bars all suits for violations of the Amtrak Act, other than

those instituted by the Attorney General or, in labor agreement controversies, by an employee or an employee representative. (SA[4] 28-39).

Although the enabling act creating Amtrak declared that the Corporation is not an "agency or establishment of the United States government," (45 U.S.C., §541), there is little doubt about the extensive public interest in the operations of the Corporation and the "quasi-public" nature of its organization.[5] It is essential, then, that Amtrak be held strictly accountable for its activities not only before Congress, *but also before the courts by parties aggrieved by its actions*, unless Congress has clearly mandated to the contrary.

Since a basic question involved in this case is the interrelationship of the intent of Congress with the ordinary right of access to the courts by parties aggrieved by actions taken by agencies created by Congress, this Court's statement, in *Barlow v. Collins*, 397 U.S. 159, 166-167, 25 L. Ed. 2d 192, 199-200, 90 S. Ct. 832 (1970), concerning the right to judicial review of actions taken by a governmental agency, is particularly appropriate:

> In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 18 L. Ed. 2d 681, 686, 87 S. Ct. 1507, we held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." A clear command of the statute will

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[4] "SA" refers to Single Appendix to petitioners' brief.

[5] For example, the Corporation continues to be financed by the U.S. Treasury and by means of Government guarantees on corporate obligations. See 45 U.S.C., §§601-2. 45 U.S.C., §543(a) provides for the Presidential appointment of a majority of the Board of Directors.

> preclude review; and such a command of the statute may be inferred from its purpose. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 88 L. Ed. 61, 64 S. Ct. 95. It is, however, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. *Abbott Laboratories v. Gardner, supra*, at 141, 18 L. Ed. 2d at 687. The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review of statutory objectives might not be realized. See the *Chicago Junction Case*, 264 U.S. 258, 68 L. Ed. 667, 44 S. Ct. 317; *Hardin v. Kentucky Utilities, supra*.

The relatively recent assault by the courts on the "standing" obstacle to obtaining judicial review by aggrieved individuals has also extended to the standing of organizations, such as the respondents in this case, to vindicate the rights of its members in judicial proceedings.[6]

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[6] In granting standing to an association in *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971), the court stated at 693, 694:

> . . . [The] revision of judicial thinking on the standing question has been accompanied by an adjunct line of cases that show a wide disposition to allow associations to appear as representatives of their members and to grant them standing to seek to vindicate the

(continued)

In this case, it is obvious that "clear and convincing evidence" of Congressional intent to limit severely judicial review of Amtrak's actions simply does not exist.

The language of Section 307[7] does not specifically exclude all parties aggrieved by action of Amtrak or a railroad from bringing suit. It does not, for example, include the word "only" when referring to petitions by the Attorney General and employees. See *Wood v. National Railroad Passenger Corp.*, 341 F. Supp. 908, 911 (D.C. Conn. 1972).

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[6] (continued)

interests of those members. See, *e.g.*, *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246, 83 S. Ct. 688, 9 L. Ed. 2d 709 (1963); *Environmental Defense Fund, Inc. v. Hardin*, 138 U.S. App. D.C. 391, 428 F.2d 1093 (1970); *Lodge 1858, American Federation of Government Employees v. Paine*, 141 U.S. App. D.C. 152, 436 F.2d 882 (April 21, 1970); *Curran v. Laird*, 136 U.S. App. D.C. 280, 420 F.2d 122 (1969) (*en banc*); *United Federation of Postal Clerks v. Watson*, 133 U.S. App. D.C. 176, 409 F.2d 462, *cert. denied, Blount v. United Federation of Postal Clerks*, 396 U.S. 902 S. Ct. 212, 24 L. Ed. 2d 178 (1969); *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied, Consolidated Edison Co. of New York, Inc. v. Scenic Hudson Preservation Conference*, 384 U.S. 941, 86 S. Ct. 1462, 16 L. Ed. 2d 540 (1966).

[7] Section 307 is set out on pp. 2-3, *supra*.

Another provision of the Act shows that Congress knew how to make itself abundantly clear when it wanted to limit judicial review. Section 202, 45 U.S.C., §522, provides that the original designation of the basic system by the Secretary of Transportation "shall not be reviewable in any court."

Petitioners argue that the intent of Congress to limit judicial review is clear because "the significant fact in the legislative history is that Congress considered but rejected a proposed amendment to Section 307 that would have authorized any aggrieved person to sue to enjoin violations of the Act." (Pet. Br., p. 14). The Court below thoroughly analyzed this contention and rejected it.

> In the instant case we are unable to draw inferences from the legislative history with any confidence. The proposed amendment was never debated or criticized by members of Congress so that failure to adopt the amendment might reasonably be construed to be congressional rejection of that which the amendment provided for. *Compare National Automatic Laundry & Cleaning Council v. Shultz*, 143 U.S. App. D.C. 274, 291, 443 F.2d 689, 706 (1971). The Committee might well have believed, notwithstanding the remarks of railway labor representatives, that Section 307 as originally drafted did not bar suits by all injured and aggrieved parties. Indeed, the only mention of the scope of Section 307 during debate on the floor of Congress suggests that Congress interpreted the section to permit such suits. (SA 36).

In its section-by-section analysis of the provisions of the Act, the Committee on Interstate and Foreign Commerce

did not discuss Section 307 in terms of limiting judicial review, but rather in terms of "authorizing" access to the courts that might otherwise have been questionable:

> Section 307 authorizes the Attorney General of the United States to sue the corporation or any railroad to prevent acts of omission or commission in violation of this legislation. In the case of labor agreements, individual employees or duly authorized employee representatives may sue for equitable relief. H.R. Rep. No. 91-1580, *supra*, p. 9.

As the court in *Wood v. National Rail Passenger Corp.*, *supra*, at 911-912, noted:

> The express authority of the Attorney General to petition for equitable relief against the corporation or any railroad may have been deemed necessary to resolve doubts that the United States had a sufficient "interest" under 28 U.S.C. §517 to allow him to bring suit to correct conduct of these private businesses, where non-criminal sanctions are involved.
>
> This is not the first time that Congress has recognized that the Attorney General should be given a substantial role in obtaining sanctions to obtain enforcement of responsibilities imposed on persons who carry out government-assisted projects. See, *e.g.*, 42 U.S.C. §§3611(g), 3613.

It is clear, then, that there is no "clear and convincing evidence" of a Congressional intent to restrict, severely,

judicial review of actions taken by Amtrak or a railroad allegedly pursuant to mandates contained in the Amtrak Act by barring parties aggrieved by such actions from initiating suits.

II.

ALLOWING PARTIES OTHER THAN THE ATTORNEY GENERAL, IN NON-LABOR CASES, TO CONTEST VIOLATIONS OF THE ACT WILL ASSURE COMPLIANCE WITH, AND NOT FRUSTRATE, THE PURPOSES OF THE ACT.

Petitioners contend that the decision below would seriously frustrate the purposes of the Amtrak Act, using as a major hypothetical example the alleged ills that would flow if any "aggrieved" passenger were allowed to contest a proposed discontinuance of an Amtrak train. (Pet. Br., pp. 24-27).

As indicated above, discontinuances are governed by Section 404 of the Act, 45 U.S.C., §564. That section provides, among other things, that proposed discontinuances by Amtrak after July 1, 1973 of trains in the basic system can take effect only after the procedures of Section 13a of Title 49 are followed. 45 U.S.C., §564(b)(3). In addition, railroads which have not contracted with Amtrak are prohibited from discontinuing intercity passenger train service until January 1, 1975, after which date train service operated by such railroads may be discontinued, again pursuant to the provisions of Section 13a of Title 49.

Section 13a of Title 49 (49 U.S.C., §13a) contains a rather elaborate set of procedures that Amtrak and the railroads must follow prior to discontinuing any train operation, including the possibility of an investigation by the

I.C.C.[8] To discontinue intrastate trains. Amtrak must seek permission from the appropriate state authority. 49 U.S.C., Section 13a(2). The results of an investigation by the I.C.C. has been held by this Court to be appealable by interested parties, pursuant to 28 U.S.C., §1336(a). *City of Chicago v. United States*, 396 U.S. 162, 24 L. Ed. 2d 340, 90 S. Ct. 309 (1969). As this Court stated in *City of Chicago v. United States, supra*, at 164, 24 L. Ed. 2d 340, 343:

> Certainly under §13a(1) the carrier, if overruled by the Commission, could obtain review. We can find no talismanic sign indicating that Congress desired to deny review to opponents of interstate discontinuances alone.

Also, as described above (pp. 8-10), Congress has mandated a large role for State and local authorities in the

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[8] Several investigations by the I.C.C. of proposed discontinuance by Amtrak are presently taking palce. See I.C.C. Finance Docket No. 27436, *National Railroad Passenger Corporation (Amtrak) – Discontinuance of Trains Nos. 30 & 31, 530 & 531– Between New York, New York/Washington, D.C., and Kansas City, Missouri (National Limited)*; ICC Finance Docket No. 27437, *National Railroad Passenger Corporation (Amtrak) – Discontinuance of Trains Nos. 52 & 53 Between Chicago and St. Petersburg/Miami, Florida (The Floridian)*; and I.C.C. Finance Docket No. 27438, *National Railroad Passenger Corporation (Amtrak) Discontinuance of Train Nos. 98 and 99 Between Newport News and Richmond, Virginia, (The George Washington/James Whitcomb Riley)*.

Consistent with Amtrak's concern in this case that accountability in the courts for their actions is too heavy a "burden" to bear, the Department of Transportation has requested, but not received, from Congress, a change in the discontinuance procedures Amtrak is presently required to follow. *Report to Congress, The Rail Passenger Service Act of 1970*, pp. 104-105 (March, 1973).

to contest violations of the Act will not frustrate, but rather will ensure timely compliance with, the purposes of the Act.

III.

SECTION 307 DOES NOT DEPRIVE THE DISTRICT COURTS OF JURISDICTION OVER SUITS BROUGHT BY PARTIES OTHER THAN THE ATTORNEY GENERAL IN NON-LABOR CASES.

Petitioners contend that Section 307 restricts access to the district courts, on jurisdictional grounds, to the Attorney General, employees, and employee representatives. (Pet. Br., pp. 29-34).

The Court below rejected this contention for essentially the same reasons it rejected the argument that only the Attorney General, in non-labor agreement cases, has standing to sue Amtrak or a railroad for violations of the Act, holding that the jurisdiction of the district court may rest on 28 U.S.C., §1337.[9]

Prior to passage of the Amtrak Act, train discontinuances had to be approved by either the State Commissions or by the Interstate Commerce Commission, pursuant to 49 U.S.C., §13a. 49 U.S.C., §13a(2), for example, requires that application for approval of discontinuances of intrastate trains must first be made to the appropriate state agency. This Court, in rejecting a contention that requiring the railroads to seek relief first from a State agency

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[9] 28 U.S.C., §1337 provides that "the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

for its intrastate train operations would frustrate the purpose of Congress in enacting §13a, stated:

> "That purpose was, as the court below observed, remedial. But it was conditioned by a desire to protect state jurisdiction over local operations. To ignore this we conclude was error."

New Jersey v. New York, S. & W. R. Co., 372 U.S. 1, 9, 9 L. Ed. 2d 541, 546, 83 S. Ct. 614 (1963).

In the instant case, petitioners argue that the "Amtrak Act expressly embodies a radical departure from past practice," using as an example the discontinuance provisions of 45 U.S.C., §561(a). (Pet. Br., p. 33, n. 34). Petitioners fail to point out, though, that the "radical departure" for discontinuances was limited in time. After July 1, 1973, trains in the basic system may be discontinued by Amtrak only in accordance with the procedures of 49 U.S.C., §13a 45 U.S.C., §564(b)(3). In addition, section 13a procedures are to be employed after January 1, 1975, for discontinuances proposed by railroads which have not entered into a contract with Amtrak pursuant to 45 U.S.C., §564(a)(1). 45 U.S.C., §564(a).

As the court below stated – when discussing procedures for train discontinuances prior to the Amtrak Act in relation to the accessibilitiy of the district courts by aggrieved parties to redress violations of the Act (SA 45):

> Passenger groups and other affected parties were allowed to intervene and argue their cases in these forums. We cannot help but believe that if Congress had wanted to take away these rights it would have done so in a more explicit fashion. Thus for the same reasons that we found no congressional intent in Section 307 to overcome the strong

> presumption of standing in favor of persons intended to be protected by legislation, we now find no congressional intent to overcome the general jurisdictional grant in Section 1337.

Petitioners rely extensively on the decision by this Court in *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 88 L. Ed. 61, 64 S. Ct. 95 (1943), to support their contention that the courts have no jurisdiction to entertain this suit. However, that case is distinguishable from the instant one not only for the excellent reasons given by the court below (SA 44-45), but also because considerable discretion is lodged in Amtrak and the railroads for taking, or not taking, actions which affect the location and availability of rail passenger service in this country.

In *Switchmen's Union, supra*, this Court described the functions of the Mediation Board under the act in question as "more the function of a referee" with "no discretion to take or withhold action." 320 U.S. at 304, 305, 88 L. Ed. at 66.

A characterization of Amtrak as merely a "referee" with no "discretion to take or withhold action" would be totally inappropriate.

For example, 45 U.S.C., §564(b)(3) provides that trains in the basic system which Amtrak determines are not required by public convenience and necessity "*may* be discontinued." 45 U.S.C., §564(b)(2) provides: "Except as provided in section 563(a) of this title, service beyond that prescribed for the basic system undertaken by the Corporation upon its own initiative *may be discontinued at any time.*" 45 U.S.C., §563(a) provides, in part: "The Corporation *may provide* intercity rail passenger service in excess of that prescribed for the basic system, ..." (Underscores all supplied).

Finally, petitioners contend that the respondents are barred from instituting this action because the Amtrak Act does not explicitly provide for private causes of action. (Pet. Br., pp. 34-36).

Such a contention lacks persuasiveness in light of this Court's opinions in *J. I. Case Co. v. Borak*, 377 U.S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964), and *Allen v. State Board of Elections*, 393 U.S. 544, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969). As the Court stated in the *Allen* case, *supra*, at 557, 22 L. Ed. 2d at 12:

> We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action. In J. I. Case Co. v. Borak, 377 US 426, 12 L Ed 2d 423, 84 S Ct 1555 (1964), we were called upon to consider §14(a) of the Securities Exchange Act of 1934. 48 Stat 895, 15 USC §78n(a). That section provides that it shall be "unlawful for any person . . . [to violate] such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." We held that "[w]hile this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." 377 US, at 432, 12 L Ed 2d at 427.

The Court further pointed out in the *Allen* case, when commenting upon a provision in the Voting Rights Act

permitting the Attorney General of the United States to institute actions to enforce provisions of that Act: "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation *instituted at the discretion of the Attorney General.*" 393 U.S. 566, 12 L. Ed. 2d at 12. (Underscore supplied).

Certainly, railroad passengers – present and future – were intended to be prime beneficiaries of the passage of the Amtrak Act. Petitioners attempt to distinguish this case from the *J. I. Case Co.* and *Allen* cases, *supra,* by suggesting that "possible violations of the Amtrak Act are not so numerous" as to overwhelm the resources available to the Attorney General for monitoring the Act. (See Pet. Br., p. 35, n. 36). This argument is rather curious, given petitioners' fears, expressed earlier in their brief (Pet. Br., pp. 22-23), that allowing access to the courts by potentially aggrieved parties, including the "several million passengers" across the country, will seriously frustrate the purposes of the Act.

Furthermore, as indicated above, Congress made discontinuances by Amtrak of basic system trains after July 1, 1973, (and discontinuances by the railroads after January 1, 1975) expressly subject to the provisions of Section 13a of the Interstate Commerce Act. Section 13a proceedings before the I.C.C. typically involve a large number of participants, including State Commissions. Appeals to the courts from I.C.C. decisions in Section 13a proceedings have been assured by this Court in *City of Chicago v. United States, supra.*

Since Congress, among other things, provided that discontinuances by Amtrak and the railroads shall be subject

to extensive public scrutiny and eventual accountability in the courts, it can hardly be argued, as petitioners do here, that Congress intended, by the provisions of Section 307 of the Act, to make the Attorney General the sole arbiter, in non-labor cases, as to when actions taken by the Corporation or by the railroads pursuant to the Act should be contested in the courts.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION, CENTRAL OF GEORGIA RAILWAY COMPANY, AND SOUTHERN RAILWAY COMPANY, *Petitioners,*

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Few points presented by the Brief for Respondent require a response:

1. Respondent asserts that individuals who benefit from a statute have a right to sue for its enforcement and that implying a private right of action under

the Amtrak Act will aid in implementation of the Act. Brief for Respondent at 20, 27. The opposite is true, because of the disabling effect that allowing such suits would have. The Act was passed for the general public benefit, not only to prevent the disappearance of intercity rail passenger service but to promote and improve such service and thus to establish a balanced national transportation system. 45 U.S.C. § 501 (1970). This would not come about through a series of individual suits in various courts throughout the country.

In the recent case of *Holloway* v. *Bristol-Myers Corp.*, No. 71-1479 (D.C. Cir., July 26, 1973), the United States Court of Appeals for the District of Columbia, through a different panel than the one which rendered the opinion below, considered a question similar to that presented here and refused to imply a private right of action to enforce the Federal Trade Commission Act. In *Holloway*, the plaintiffs argued that, as consumers, they were within the group intended to be protected by the Act and that only through private rights of action could they be protected against false advertising. They urged that a private right of action should be implied from the existence of

> (1) a Federal statutory or constitutional prohibition against the acts complained of; (2) inclusion of the defendant in the class upon which the duty of statutory compliance has been imposed; (3) legislative intent to place the party claiming injury within the ambit of the statute's protection or to confer a substantive benefit or immunity upon him; (4) injury or threatened harm proximately resulting from the defendant's breach of duty; and (5) unavailability or ineffectiveness of alternative avenues of redress. [Slip Opinion at 5.]

The court held that these conditions were necessary but not sufficient to support implication of a private right of action. The court recognized that the statutory prohibition of false advertising was for the public benefit but concluded that Congress had intended that this public benefit would be best protected by vesting a specialized administrative agency, and not private individuals, with responsibility to enforce the Act. For reasons equally applicable to this case, the court held that private enforcement of the Act would seriously interfere with the enforcement activities of the Federal Trade Commission. The court stated that

> [j]udicial implication of ancillary Federal remedies is a matter to be treated with care, lest a carefully erected legislative scheme—often the result of a delicate balance of Federal and state, public and private interests—be skewed by the courts, albeit inadvertently. [*Id.* at 6.]

The court envisioned that judicially engrafting a private right of action could result in "vexatious litigation" which would impede the public enforcement of the Act by the Federal Trade Commission:

> Private litigants are not subject to the same constraints. They may institute piecemeal lawsuits, reflecting disparate concerns and not a coordinated enforcement program. The consequence would burden not only the defendants selected but also the judicial system. It was to avoid such possibilities of lack of coherence that Congress focused on the FTC as an exclusive enforcement authority. [*Id.* at 23.]

We urge that respondent's argument be rejected for the same reason that the court in *Holloway* v. *Bristol-Myers, supra,* rejected such an argument. The Court

of Appeals, in deferring to the judgment of Congress in selecting the Federal Trade Commission to enforce the Act, said that

> [w]e are considering an Act in which ends and means, the social ends to be fostered and the administrative means of achieving those objectives, are inseparably interwoven into a unified and comprehensive statutory fabric. Both are the product of a legislative balance which took into account not only consumer protection but also interests of the businesses affected, with particular concern for tempered enforcement, the orderly development of commercial standards, and freedom from multiplicious litigation. [*Id.* at 22.]

2. Respondent states that the Attorney General has advised by letter "that he has no power under the Act 'to sue for a construction of the [Amtrak] Act or to enjoin a purely technical violation.'" Brief for Respondent at 23. This quotation, which respondent has taken out of context, misrepresents the position of the Attorney General.

In his letter of November 19, 1971, Assistant Attorney General L. Patrick Gray, III, informed Congressman John Slack of West Virginia that after study and consultation with the Department of Transportation, the Department of Justice had concluded not to initiate proceedings to compel the restoration of certain rail service discontinued by the Baltimore & Ohio Railroad. Appendix to Brief for Respondent at 29-31. The Assistant Attorney General noted that the Baltimore & Ohio Railroad asserted that the subject trains were "intercity" in nature. If so, then discontinuance was admittedly lawful under the Amtrak Act. If, however, the trains were actually "commuter" trains, discontinuances could be made only according to Section 13a of

the Interstate Commerce Act,[1] and plaintiffs would have an appropriate remedy for violation of *that* Act at the ICC or in federal court. In either case, no violation of the *Amtrak* Act was involved, and therefore neither case was "a proper one for intervention by the Justice Department." *Id.* at 31. It was this distinction between an action involving a violation of the Amtrak Act and an action not involving a violation of the Amtrak Act[2] which the Assistant Attorney General correctly recognized and referred to when he stated that

> the statutory mandate of section 307(a) does not give the Attorney General the authority to sue for a construction of the Act or to enjoin a purely technical violation. [*Id.* at 30 (footnote omitted).]

In the footnote to this statement, the Assistant Attorney General indicated what he meant by "technical violation":

> Any suit to halt discontinuance would, at most, turn into a technical struggle over the inclusiveness of the statutory term "commuter train". Such a determination would serve no useful purpose and would not serve to enhance and protect the statutory scheme of the Act, which is the only mandate the Attorney General has thereunder [*Id.*]

Certainly it has never been questioned, as the Assistant Attorney General recognized in his letter, that the

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[1] Railroads may alternatively seek authorization for train discontinuances from the appropriate state regulatory agency. However, this procedure is lengthy and cumbersome because it requires numerous hearings. As a result, railroads almost always choose to follow the Section 13a procedure.

[2] This is exactly the distinction drawn by the Court of Appeals in its *Potomac Passengers Ass'n* opinion, which allows private parties to sue railroads for a declaratory judgment that certain discontinued trains are commuter, not intercity. *Potomac Passengers Ass'n* v. *Chesapeake & O. Ry.*, 475 F.2d 325 (D.C. Cir. 1973).

Attorney General has authority to bring suit whenever Amtrak or any other railroad, in the words of the Act,

> engages in or adheres to any action, practice or policy inconsistent with the policies and purposes of this [Act], obstructs or interferes with any activities authorized by this [Act], refuses, fails or neglects to discharge its duties and responsibilities under this [Act], or threatens any such violation, obstruction, interference, refusal, failure, or neglect * * *. [45 U.S.C. § 547(a) (1970).]

When read in context, the statements made in the letter of November 19, 1971, by the Assistant Attorney General are consistent with the more recent letter of September 6, 1972, from the Acting Assistant Attorney General, E. Grey Lewis, which states that it is the position of the Department of Justice that "in non-labor agreement cases, Section 307 of the Act, 45 U.S.C. 547, reserves to the Attorney General the exclusive right to sue Amtrak or any railroad for actual or threatened violation of the policies and provisions of the Act." Appendix E to Petitioners' Petition for a Writ of Certiorari at 42a. This position of the Department of Justice has recently been reaffirmed by the Solicitor General. Memorandum for the United States as Amicus Curiae at 5.[3]

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[3] Respondent also accuses petitioners of taking out of context the testimony of Anthony Haswell, formerly President of respondent, at hearings on the Amtrak Act. Brief for Respondent n.51 at 23. Respondent contends that Mr. Haswell's remarks were directed only to the issue of whether other federal agencies should have control of Amtrak's service. But Mr. Haswell did not so state. His comments were in answer to a question as to whether there were any controls on the service of Amtrak. Mr. Haswell expressed agreement with the method of enforcement provided in the Act and confidence that Congress would continue to re-

3. Respondent argues that there have been massive discontinuances of train service under the Amtrak Act. Brief for Respondent at 3, 10. To make this argument, it relies upon cases such as *Potomac Passengers Ass'n* v. *Chesapeake & O. Ry., supra*,[4] which the Court of Appeals characterized as an action for a declaratory judgment that certain trains were "commuter" rather than "intercity." These cases properly involve not alleged violations of the Amtrak Act, which does not govern commuter trains, but rather alleged violations of the Interstate Commerce Act, which does. Since these cases do not raise the possibility of a violation of the Amtrak Act, they are irrelevant to the issue before the Court in this case—that is, what parties may bring an action under Section 307 to enjoin a violation of the Amtrak Act.

4. Respondent notes that "[w]hen Congress wanted to exclude judicial review in [the Amtrak Act], it expressly said so, as in Section 202 of the Act, where it precluded judicial review of the basic system prescribed by the U.S. Secretary of Transportation." Brief for Respondent at 18. Petitioners do not dispute this statement. However, the present case involves not the

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assess Amtrak's operation. He stated that he was not concerned about lack of control,

> either in the statute itself, enforceable by the courts, or in the hands of some other agency. I am certain, if, after the first year, we are not getting the results that we want along these lines, the Congress will take a very thorough look. [Supplemental Hearings on H.R. 17849 and S. 3706 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess., ser. 91-62, at 178 (1970) (hereinafter cited as "Supp. Hearings").]

[4] The decision in the *Potomac Passengers Ass'n* case was not appealed, and the correctness of that decision is not before the Court.

right of aggrieved persons to seek judicial review of administrative decisions, but rather the much different right of such persons to commence original injunctive actions in the District Courts. The only relevance of Section 202 to the Section 307 issue in this case is that both provisions are part of a carefully balanced scheme by which Congress sought to preserve and restore intercity railroad passenger service. In setting up this scheme, Congress placed responsibility on selected government officials, whose experience and expertise it deemed vital to survival of the National Railroad Passenger Corporation. And Congress intentionally restricted the ability of private individuals to obstruct or delay the Congressional scheme by initiating judicial review or filing private rights of action for personal motives of their own.[5]

Moreover, respondent's reliance upon Congress's ability to express its intentions clearly points up a basic internal inconsistency in the analysis of both respondent and the Court of Appeals. For if it is assumed that Congress says precisely what it means, why is it that the Amtrak Act is silent with regard to whether any aggrieved person can bring an action under the Act? If Congress had intended to provide a right of action for all injured and aggrieved persons, would it not have so stated in a specific provision rather than leaving such a right to be "implied" from the general

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[5] Respondent also claims that there is no Congressional intent to bar suits against Comsat under Section 403(a) of the Comsat Act. Brief for Respondent at 27. However, no court has made such a determination. Moreover, the public seems to disagree with respondent's interpretation of Congressional intent, because no actions have been filed under Section 403(a) of the Comsat Act.

purposes of the Act? SA 45.[6] It is certainly inconsistent to argue, as the Court of Appeals did (SA 38) that "Congress could just as easily have made clear its desire to limit the right to seek review" by inserting the word "only" in the Act, and then to assert that Congress did not make clear its desire to grant a private right of action but instead left that important matter to "implication" from the Act as a whole. And even if Congress for some reason did not wish to provide specifically for the cause of action claimed here, surely it could have used general language similar to that in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(f)(6): "The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law." The Congress was aware that the Court had found this kind of language persuasive in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 144 (1967).

5. Respondent points out that the title of Section 307 of the Amtrak Act, as printed in the United States Code and in the Brief for Petitioners, is at variance with the title of Section 307 as enacted. Brief for Respondent at 2. Respondent is correct. Evidently, the codifier interpreted the word "Sanctions," which is the title of Section 307 as enacted, to mean "Jurisdiction of the District Courts of the United States to Impose Sanctions," which is the title of Section 307 repro-

[6] Agreeing with part of petitioners' argument, the Court of Appeals held that 28 U.S.C. § 1337 (1970) only permits jurisdiction but does not create a cause of action. SA 45. The Court did *not* find that Section 307 of the Amtrak Act gives all aggrieved persons a cause of action. Rather, the Court implied the existence of such a right of action from what it considered to be the general purpose of the Act, namely, the protection of railroad passengers. SA 45-46.

duced in the United States Code. However, the *text* of Section 307 as enacted by Congress appears verbatim in the Code and in petitioners' brief, and petitioners stand on all arguments in their main brief premised on that statutory language.

6. Respondent implies that passengers will be subjected to massive discontinuances of railroad services for which they will have no remedy if the Court fails to find that a private right of action exists under Section 307. Brief for Respondent at 3, 6, 11-12. There is no basis whatever for believing that this dire prediction will materialize. Respondent ignores the fact that the traditional remedy of review of discontinuances is still available for all lines which are part of the basic system. The Amtrak Act provides that after July 1, 1973, no passenger train service in the basic system may be discontinued except in compliance with Section 13a of the Interstate Commerce Act, which authorizes railroads to petition the Interstate Commerce Commission for permission to discontinue passenger trains. 45 U.S.C. § 564(b)(3) (1970). Passengers may seek judicial review of Interstate Commerce Commission orders allowing discontinuances made pursuant to this Section. *City of Chicago* v. *United States,* 396 U.S. 162 (1969). The basic system includes most of Amtrak's intercity service, as respondent acknowledges. Brief for Respondent at 20 n. 44. Of the five discontinuances of intercity service attempted by Amtrak since its inception, three were of basic system service,[7] and two were not.

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[7] Amtrak has withdrawn two of the three applications for discontinuances of basic system service it filed with the Interstate Commerce Commission. *See National Railroad Passenger Corp. (Amtrak)—Proposed Discontinuance of Trains Nos.* 30 & 31, 530 & 531—*Between New York, New York/Washington, D. C., and Kansas City, Missouri* (*National Limited*), F.D. No. 27436; *Na-*

Consequently, the implication that failure of the Court to imply a private right of action under Section 307 will result in massive discontinuances not subject to judicial review is without foundation.

7. Respondent seriously misrepresents that the Amtrak Act was rushed through Congress and passed the final day before adjournment. Brief for Respondent at 7-8, 13.

Congress first began to deal with the deterioration of passenger service in 1958—fifteen years ago—but at that time no solution was apparent. 116 Cong. Rec. 36895 (1970) (remarks of Senator Allott). As early as 1961, serious consideration was given by a Senate Commerce Committee staff study (the "Doyle Report") to placing responsibility for such service upon a private corporation established by Congress. S. Rep. No. 91-765, 91st Cong., 2d Sess. 89 (1970). On April 9, 1970, the Senate Commerce Committee, after three days of hearings on rail passenger service, gave a favorable report to S.3706, which essentially proposed federal subsidies for revitalization of rail passenger service. *Id.* at 6. In its report, the Committee recognized that one solution to the problem of deteriorating rail passenger service could be a federal corporation or a quasi-public corporation to operate passenger trains. *Id.* at 5. Senator Prouty, who voted with the majority of the Committee to report S.3706, submitted an alternative draft to S.3706. This draft, which proposed creation of a

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tional Railroad Passenger Corp. (Amtrak)—Proposed Discontinuance of Trains Nos. 52 & 53 Between Chicago and St. Petersburg/Miami, Florida (The Floridian), F.D. No. 27437.

Rail Passenger Corporation, was in basic form the bill which was eventually enacted as the Amtrak Act. *Id.* at 76-88.

When the rail passenger service bill was called for Senate floor debate on May 5, 1970, Senator Prouty's proposal was offered as a substitute. In the debate, Senator Magnuson, Chairman of the Commerce Committee, explained that he offered Senator Prouty's proposal as a substitute because the Committee had finally been notified of administration support for a national rail passenger service corporation. 116 Cong. Rec. 14160 (1970). He stated that

> * * * the committee chairman and the subcommittee chairman who supported the reporting of S. 3706 have joined with their counterparts from across the aisle to sponsor a substitute for the reported bill. This is not a course taken lightly. * * * We pointed out, however [in the report on S. 3706], that the committee was not convinced that that legislation (S.3706) represented the only possible answer to the problem. * * *
>
> A few days after the report was filed, the Secretary of Transportation, in meetings with Senators Cotton, Hartke, Prouty, and me, notified us that at long last he had been authorized to express administration support for a national corporation approach. [Id.]

Senator Prouty's proposal was passed by the Senate on May 6, 1970, by a vote of 78 to 3, after two days of extensive debate. 116 Cong. Rec. 14160-178, 14269-283, 14285-287 (1970).

Senator Prouty's proposal was considered in hearings on June 2, 3, and 4, 1970, by the House Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce. During these three days of hearings, seventeen witnesses appeared before the Subcommittee, and fourteen organizations, individuals, and departments submitted additional material for the record.

H.R. 17849, reported favorably by the House Committee on October 7, 1970, was, with minor amendments, the same bill as S.3706—Senator Prouty's proposal—passed by the Senate on May 6. H.R. Rep. No. 91-1580, 91st Cong., 2d Sess. 2 (1970). H.R. 17849 was passed by the House on October 14, 1970, after two days of debate. 116 Cong. Rec. 36594-600, 36655-664 (1970). On the same day the Senate considered and passed H.R. 17849, which was explained to the Senate as being essentially the same bill as S.3706, approved by the Senate five months earlier. 116 Cong. Rec. 36894-895 (1970).

Thus, the passage of the Amtrak Act by Congress can hardly be described as rushed. This characterization is refuted by the study given to the proposal of a national railroad passenger corporation as early as 1961 in the "Doyle Report" and the preparation and negotiations which culminated in the passage of S.3706 by the Senate in May 1970. As set out above, this proposal, agreed upon by various associations, departments, labor, and the sponsors of the bill was, with minor amendments, the same bill which was passed by the House in October 1970 after hearings and lengthy debate.

8. Respondent claims that petitioners are mistaken in stating that Section 307, as redrafted by the House

Interstate and Foreign Commerce Committee and as enacted, is in "exact conformity" with the recommendations of Secretary of Transportation Volpe.[8] Brief for Respondent at 15. Respondent's claim is in error. The suggestions of Secretary Volpe which respondent claims the Committee rejected had nothing to do with the issue of who could bring an action under Section 307. Rather, they were directed to whether railroads, as well as Amtrak, could *be* sued.

The draft of Section 307 being considered by the Committee provided that the District Courts would have jurisdiction to hear actions against Amtrak, but not against other railroads, "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any individual affected thereby * * *." Supp. Hearings at 44. At the hearings two amendments to Section 307 were proposed by witnesses speaking for organized labor. The first

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[8] Respondent asserts that in the Brief for Petitioners

> for the first time, Amtrak and the railroads advance the contention that an intention by Congress to exclude private parties from the courts may be inferred by "acceptance of an Executive Branch recommendation" made by "the administrative officer charged with administration of the Act", in this case the U.S. Secretary of Transportation, John A. Volpe. [Brief for Respondent at 15].

This charge is false. Petitioners have repeatedly made the argument that the Congress followed the recommendation of Secretary Volpe in rejecting the proposed amendment to allow any person to sue under Section 307. *See* Brief for Appellees Central of Georgia Railway Company and Southern Railway Company in the Court of Appeals at 8; Brief and Appendix for Appellee National Railroad Passenger Corporation in the Court of Appeals at 24-25; and Petitioners' Petition for a Writ of Certiorari at 15-16.

amendment would amend Section 307 to allow actions against all railroads as well as Amtrak. The second amendment proposed at the hearings bears directly on the issue in this case. This amendment would have allowed "any aggrieved party, including employee representatives," to bring an action under Section 307. Supp. Hearings at 134. Secretary Volpe, at the request of the Committee, submitted his views on the two proposed amendments, and the bill as enacted followed his recommendation exactly concerning who should be allowed to bring an action under Section 307. Secretary Volpe agreed that railroad employees and their representatives should be entitled to sue under Section 307, and the Committee amended the bill to allow these suits. However, Secretary Volpe drew the line at permitting "any person" to sue, and the Committee complied with his objection.[9]

9. Respondent expresses dissatisfaction with the way Amtrak is running its railroads. Brief for Respondent at 24 n. 53. It argues that Amtrak should provide a better choice of routes for winter vacationers and should not "by-pass" certain places. For example, Amtrak should not "bypass the spectacularly scenic Colorado Rockies west of Denver." *Id.* Respondent attacks the quality of service and the on-time performance of Amtrak, as well as the "non-cooperation" of other railroads. *Id.*

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[9] Even Secretary Volpe's comments with regard to whether the bill should allow all railroads to *be* sued were not at variance with the Committee's action. Secretary Volpe simply said he was not sure it was *necessary* to make sanctions under this Act applicable to all railroads, but he did not declare that he was *opposed* to that inclusion.

We believe that nothing could better demonstrate the quagmire the courts would enter if this case is affirmed than these assertions by respondent. Respondent would have the courts "come to grips with [the] fundamental problems" of running a railroad (*id.*), but that is not the function of the courts under the statute. Burdening the courts with decisions in regard to the day-to-day operations of Amtrak at the request of every dissatisfied passenger is not in the interests of the judicial system or the legislative scheme carefully designed to preserve intercity rail passenger service for the benefit of the general public. The Court of Appeals, in deciding *Holloway* v. *Bristol-Myers, supra,* rejected a similar claim that the Federal Trade Commission, "because of insufficient staff and competing demands in other spheres of its jurisdiction, * * * is simply unable to provide effective enforcement in the field of false advertising." *Id.* at 28. The Court of Appeals in *Holloway* deferred to the judgment of Congress that the Federal Trade Commission was the proper agency to enforce the statutory prohibition of false advertising.

In passing the Amtrak Act, Congress was aware that embroiling the newly created corporation in unlimited litigation would be destructive to Amtrak's limited resources and to the Congressional purpose of preventing the disappearance of intercity rail passenger service. To this end Congress chose to minimize litigation by making the Attorney General the watchdog of the public interest. Allowing private suits under Section 307 would upset this Congressional scheme and would make the courts train dispatchers, train masters, and stationmasters. Petitioners urge the Court to avoid this

dilemma by refusing to imply a private right of action under Section 307.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION, CENTRAL OF GEORGIA RAILWAY COMPANY, and SOUTHERN RAILWAY COMPANY,

Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondent, National Association of Railroad Passengers, petitions for rehearing of the order, decision, and opinions entered January 9, 1974. ___ U.S. ___, 42 U.S.L.W. 4132.

1. Amtrak never operated these trains; Amtrak never announced the discontinuance of the trains; and Amtrak never assumed responsibility for the passenger train service.

The impression created by the court's opinion is that this action was instituted to enjoin a discontinuance by Amtrak of certain Amtrak trains:[1]

> "The respondent, the National Association of Railroad Passengers (NARP), brought this action in the District Court to enjoin the *announced discontinuance* of certain passenger trains that had previously been operated by the Central of Georgia Railway Company (Central) . . .
>
> ". . . Central contracted with Amtrak for the latter to *assume* Central's intercity rail passenger service responsibilities . . .
>
> "The train discontinuances that precipitated this action were announced by Amtrak pursuant to §404(b)(2) of the Amtrak Act, 45 U.S.C. 564(b)(2)."

In actual fact, this is not an action to enjoin any discontinuance by Amtrak, or any announcement of discontinuance by Amtrak. Rather, the action was brought to enjoin the discontinuance of service by Central. It was Central that posted discontinuance notices, effective May 1, 1971, pursuant to section 401(a)(1) of the Amtrak

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[1] This also appears to be the impression of the Reporter of Decisions, as shown in the syllabus.

Act, 45 U.S.C. 561(a)(1). The action below was instituted April 27, 1971 to enjoin Central's proposed discontinuance under section 401(a)(1). At all times, Central operated the passenger trains. Amtrak never operated Central's trains, and never assumed or undertook responsibility for Central's service.

Under the court's apparent theory, Amtrak by contract assumed Central's responsibility for the provision of Central's passenger service; and then Amtrak discontinued the service, pursuant to section 404(b)(2), 45 U.S.C. 564(b)(2), because Amtrak is said to be able to discontinue any passenger service outside the "basic system" on its own initiative.

Section 401 nowhere states that Amtrak is to assume or to undertake Central's responsibility for such service.

Section 401 merely says that the contract *may* be made upon such terms and conditions as necessary to *permit* Amtrak to undertake passenger service on a timely basis. Here, the Amtrak-Central contract, which is of record, expressly states that Amtrak will not undertake any initial service on Central's lines.[2]

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[2] Exhibit C and Appendix B thereto of Memorandum of Defendants in opposition to Plaintiff's Motion for Temporary Restraining Order, filed April 28, 1971 in the U.S. District Court. (S.A. 1). Amtrak's theory of the contracting process is set forth in its Annual Report, reproduced in Hearings on *Administration's Request for Additional Funding for Amtrak*, before Subcommittee on Surface Transportation of Senate Committee on Commerce, 92d Cong., 1st Sess., Ser. No. 92-29 at 118-20 (1971).

Section 404(b)(2) is wholly inapplicable to Central's former service, which it discontinued under section 401(a)(1). Section 404(b)(2) provides no basis for a theoretical discontinuance of a train never operated by Amtrak and for which Amtrak never assumed responsibility.[3] Section 404(b)(2) reads:

> "Except as otherwise provided in this paragraph and in section 403(a) of this Act, service beyond that prescribed for the basic system undertaken by the Corporation upon its own initiative may be discontinued at any time. No such service undertaken by the Corporation on or after January 1, 1973 shall be discontinued until the expiration of the one-year period beginning on the date of enactment of this sentence."

Footnote No. 2 to the court's opinion reads:

> "Except in certain limited situations not here pertinent, 45 U.S.C. 564(b)(2) authorizes Amtrak to discontinue any passenger service, other than that contained in a 'basic system' designated by the Secretary of Transporation, upon its own initiative."

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[3] The notion of a Section 404(b)(2) discontinuance by Amtrak appears to have been first advanced by petitioners upon rebuttal oral argument. It is suggested that Amtrak's brief more aptly describes section 404(b)(2) as governing the discontinuance of service actually provided by Amtrak in excess of the basic system, except that any excess service provided for a continuous period of two years becomes part of the basic system. (Pet. Br., pp. 7-8).

Amtrak never undertook Central's service. Amtrak was required by the specific terms of section 401(a)(1) to tender a contract to Central to *relieve* Central, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service, but that contract provided that Amtrak would not undertake any initial service on Central's lines.

Whether the discontinuance of the "Nancy Hanks" is termed a Central discontinuance and/or an Amtrak discontinuance is of considerable importance.[4]

The court in its opinion (pp. 8-11) lays great stress upon the importance of upholding the supposed legislative intent of allowing Amtrak a wide latitude of discretion with regard to discontinuances and changes of train service. The court apparently felt that this legislative policy would be compromised by allowance of private actions such as the present. But we are not complaining about a discontinuance by Amtrak. The legislative history is devoid of any indication that shielding railroads (as distinct from Amtrak) from private actions for violations of the Amtrak Act was in any way essential to effectuate the purpose of the Act.

The interpretation given section 307(a) by U.S. Secretary of Transportation, John A. Volpe, was that railroads were already covered by existing statutes, such that section 307(a) is surplusage as to private railroads. Indeed, the court's opinion gives great weight otherwise to Secretary

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[4] See also: *In Re Penn Central Transportation Company*, 329 F. Supp. 572 (E.D. Pa. 1971).

Volpe's views during the drafting process. Secretary Volpe said:[5]

> "With respect to inclusion of all railroads within the reach of the section, it should be noted that existing statutes apply to them. To an extent the Corporation is exempt from such statutes or statutory requirements. Consequently, I am not sure it would be necessary to make sanctions applicable to any railroad. This is particularly so here where such sanctions expressly reach 'any action, practice, or policy'. The Corporation has a quasi-public character in many respects and the scope of the sanctions with respect to it is appropriate. There is no comparable situation, however, with respect to railroads generally."

This action was brought to enjoin the discontinuance of trains by Central, and not the announced discontinuance or discontinuance by Amtrak. Accordingly, whatever the interest of Congress is with respect to private actions against Amtrak, Congress did not intend to preclude private actions against railroads.

2. The discontinuance by Central is contrary to the laws of Georgia.

The court's opinion states that respondent has pointed to no provision of law outside the Amtrak Act for relief.

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[5] Supp. Hearings on H.R. 17849 and S. 3706 before Subcommittee on Transportation and Aeronautics of House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., Ser. No. 91-62 at 85 (1970).

> "The respondent has pointed to no provision of law outside the Amtrak Act itself that can be read to create or imply the cause of action that it seeks to bring against the petitioners. It follows that support for the bringing of this action must be found, if at all, within the four corners of that Act."

On the contrary, our brief pointed out that train discontinuances are subject to state law. (Resp. Br., p. 26, fn. 58):

> "Apart from Rail Passenger Service Act of 1970, discontinuance of the "Nancy Hanks" would be barred by section 93-307 of the Georgia Code, and Railroad Passenger Rule No. 18 of the Georgia Public Service Commission, without prior approval by the State agency."

Section 307(b) of the Amtrak Act provides:

> "Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this Act."

The notices posted and filed by Central pursuant to section 401(a)(1), announcing discontinuances effective May 1, 1971, did not act to invoke the substantive jurisdiction of the Interstate Commerce Commission, so as to supersede the laws of Georgia. This is because the reference in section 401(a)(1) is only to the notice procedures of section 13a(1) of the Interstate Commerce Act. See: Ex Parte No. 217, 36 Fed. Reg 5219, 5220 (March 18, 1971); 49 C.F.R. 1122.9.

3. The Amtrak Act provides for administrative remedies for aggrieved persons upon discontinuance of most Amtrak trains.

The court infers (pp. 8-11) an intention by Congress to permit Amtrak to avoid the time-consuming process of hearings before State regulatory bodies or the Interstate Commerce Commission in order to discontinue or change its train service. Accordingly, the court does not see that the judicial process should be used as a substitute for the former administrative proceedings, and that an injunction *pendente lite*, forcing Amtrak to continue "uneconomic" service, would undercut the efficient apparatus for the "paring of uneconomic routes."

It is respectfully suggested that the exact opposite is the true situation. Virtually all train discontinuances by Amtrak are now subject to state or I.C.C. hearings. This is because Amtrak has been in operation for over two years, with the result that most of its service is now "basic system", and cannot be discontinued without recourse to the I.C.C. or state agencies. Section 404(b)(3), 45 U.S.C. 564(b)(3).[6] Moreover, P.L. 93-146, signed November 3, 1973 (prior to argument on November 12), placed further restrictions on discontinuances by Amtrak. Indeed, the U.S. Secretary of Transportation had recommended changes in the Amtrak so as to eliminate such administrative proceedings and judicial review.[7] The Congress rejected the Secretary's recommendations.

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[6] See definition of "basic system" in section 102(4), 45 U.S.C. 502(4), and the provision for "excess service" in section 403(a), 45 U.S.C. 563(a).

[7] See: Exhibit A to Brief for Petitioners, at pp. 104-5, 107-8.

Since the Congress desires to have the Amtrak program kept under state and I.C.C. control, with the right of judicial review, *City of Chicago v. United States*, 396 U.S. 162 (1969), it is only natural to infer judicial remedies in those few instances not covered by administrative proceedings.

4. Mandamus has been denied to Respondent in an analogous situation.

Mr. Justice Brennan, in his concurring opinion, suggests that respondent might maintain an action for mandamus in lieu of the action brought below. However, the U.S. Court of Appeals for the D. C. Circuit denied mandamus in a train discontinuance proceeding. *National Association of Railroad Passengers v. Mitchell*, (No. 72-1192).

Accordingly, respondent would not have an effective remedy if the instant opinion is allowed to stand.

CONCLUSION

For the reasons set forth, respondent prays that this Court grant rehearing of the order, decision, and opinions of January 9, 1974.

Respectfully submitted,

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February 1974

CERTIFICATE OF COUNSEL

As counsel for the respondent, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

_____

Counsel for Respondent

Syllabus

NATIONAL RAILROAD PASSENGER CORP. ET AL. v. NATIONAL ASSOCIATION OF RAILROAD PASSENGERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1289. Argued November 12, 1973—Decided January 9, 1974

Respondent brought this action to enjoin discontinuance of certain passenger trains on the ground that such discontinuance was prohibited by the Rail Passenger Service Act of 1970 (Amtrak Act). The District Court dismissed the action on the ground that respondent lacked standing under § 307 (a) of the Amtrak Act, which confers jurisdiction on federal district courts to grant equitable relief on petition of the Attorney General or, in a case involving a labor agreement, on petition of any affected employee, including authorized employee representatives, if Amtrak or any railroad acts inconsistently with the Act or fails to discharge its responsibilities thereunder. The Court of Appeals reversed, holding that respondent did have standing and that § 307 (a) does not otherwise bar such a suit by an allegedly aggrieved private party. *Held:* Section 307 (a), in light of its express language, and the legislative history of that provision and of the Act as a whole, provides the exclusive remedies for breaches of any duties or obligations imposed by the Act, and no additional private cause of action to enforce compliance with the Act can properly be inferred. Pp. 455-465.

154 U. S. App. D. C. 214, 475 F. 2d 325, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the result, *post*, p. 465. DOUGLAS, J., filed a dissenting opinion, *post*, p. 466. POWELL, J., took no part in the consideration or decision of the case.

E. Barrett Prettyman, Jr., argued the cause for petitioners. On the brief were *William O. Bittman, Curtis E. Von Kann*, and *Charles A. Horsky*.

Gordon P. MacDougall argued the cause and filed a brief for respondent.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, the National Association of Railroad Passengers (NARP), brought this action in the District Court to enjoin the announced discontinuance of certain passenger trains that had previously been operated by the Central of Georgia Railway Co. (Central). Named as defendants were Central, its parent, Southern Railway Co. (Southern), and the National Railroad Passenger Corp. (Amtrak), all of which are the petitioners in this Court. The question before us is whether this action is maintainable under applicable federal law.

After the enactment of the Rail Passenger Service Act of 1970 (Amtrak Act), 84 Stat. 1327, 45 U. S. C. § 501 *et seq.*, Central contracted with Amtrak for the latter to assume Central's intercity rail passenger service responsibilities.[1] Southern has not entered into any contract with Amtrak. The train discontinuances that precipitated this action were announced by Amtrak pursuant to § 404 (b)(2) of the Amtrak Act, 45 U. S. C. § 564 (b)(2).[2] The gravamen of the respondent's com-

Paul Rodgers and *Sumner J. Katz* filed a brief for the National Association of Regulatory Utility Commissioners as *amicus curiae* urging affirmance.

[1] Section 401 of the Act, 45 U. S. C. § 561, authorizes Amtrak to contract with any railroad to undertake its entire responsibility for intercity rail passenger service. Upon entering such a contract, a railroad can discontinue any intercity passenger train by merely filing a 30-day notice of intent with the Interstate Commerce Commission, in accordance with the notice requirements of § 13a of the Interstate Commerce Act, 49 U. S. C. § 13a.

[2] Except in certain limited situations not here pertinent, 45 U. S. C. § 564 (b)(2) authorizes Amtrak to discontinue any passenger service,

plaint was that these discontinuances are not authorized by, and in fact are prohibited by, the Amtrak Act.[3] The District Court concluded that the respondent lacks standing under § 307 of the Amtrak Act, 45 U. S. C. § 547, and accordingly dismissed the action. The Court of Appeals reversed and held that the respondent has standing and that § 307 does not otherwise bar such a suit by a private party who is allegedly aggrieved.[4] We granted certiorari to decide whether such a private cause of action can be maintained in light of § 307 (a) of the Amtrak Act. 411 U. S. 981 (1973).

In this Court and in the Court of Appeals, the parties have approached the question from several perspectives. The issue has been variously stated to be whether the Amtrak Act can be read to create a private right of action to enforce compliance with its provisions; whether a federal district court has jurisdiction under the terms of

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other than that contained in a "basic system" designated by the Secretary of Transportation, upon its own initiative.

[3] The respondent's position on the merits is based on the fact that the Central of Georgia Railway Co., which entered a contract with Amtrak, is a subsidiary of Southern Railway Co., which did not enter a contract with Amtrak. The respondent contends that the contract between Amtrak and Central does not comply with § 401 (a) (1) of the Amtrak Act because Southern, the parent company, has not contracted with Amtrak. Since § 401 (a) (1) authorizes only a contract for Amtrak to undertake a railroad's *entire* responsibility for intercity rail passenger service, the respondent contends that Southern cannot relieve itself of only *part* of this responsibility by allowing a subsidiary to contract with Amtrak while declining itself to do so. Accordingly, the respondent argues that Southern and Central, having entered no statutorily authorized contract with Amtrak, are prohibited by § 404 (a), 45 U. S. C. § 564 (a), from discontinuing any passenger train before January 1, 1975.

[4] The decision of the District Court is unreported. The opinion of the Court of Appeals appears at 154 U. S. App. D. C. 214, 475 F. 2d 325 (1973).

the Act to entertain such a suit; and whether the respondent has standing to bring such a suit. Because the reference in each instance is to § 307 (a) of the Act and the legislative history behind that provision, these questions overlap in the context of this case even more than they ordinarily would. But, however phrased, the threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it.

The respondent has pointed to no provision of law outside the Amtrak Act itself that can be read to create or imply the cause of action that it seeks to bring against the petitioners. It follows that support for the bringing of this action must be found, if at all, within the four corners of that Act. The only section of the Act that authorizes any suits to enforce duties and obligations is § 307 (a), which provides:

> "If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected

thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat." 45 U. S. C. § 547 (a).

In terms, § 307 (a) purports only to confer jurisdiction, not to create a cause of action. The legislative history, however, makes clear that the congressional purpose was to authorize certain types of suits for the enforcement of the Act's provisions. The House Report explained the section as follows:

> "Section 307 authorizes the Attorney General of the United States to sue the corporation or any railroad to prevent acts of omission or commission in violation of this legislation. In the case of labor agreements, individual employees or duly authorized employee representatives may sue for equitable relief." H. R. Rep. No. 91–1580, p. 9 (1970).

In light of the language and legislative history of § 307 (a), we read it as creating a public cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the Act. The only private cause of action created by that provision, however, is explicitly limited to "a case involving a labor agreement." Thus, no authority for the action the respondent has brought can be found in the language of § 307 (a). The argument is made, however, that § 307 (a) serves only to *authorize* certain suits against Amtrak and that it should not be read to *preclude* other private causes of action for the enforcement of obligations imposed by the Act. The respondent claims that railroad passengers are the intended beneficiaries of the Act and that the courts should therefore imply a private cause of action whereby they can enforce compliance with the Act's provisions. See *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 431–432 (1964). It goes without saying,

however, that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act.

A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills* v. *United States*, 278 U. S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307 (a) are the exclusive means to enforce the duties and obligations imposed by the Act. But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. *Neuberger* v. *Commissioner*, 311 U. S. 83, 88 (1940). Accordingly, we turn to the legislative history of § 307 (a).

The original draft of § 307 (a) differed from its present form in several respects. It conferred upon federal district courts jurisdiction to entertain suits against Amtrak (but not individual railroads) "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any individual affected thereby . . . ."[8] At the hearings of the House

[8] Supplemental Hearings on H. R. 17849 and S. 3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., ser. 91–62, p. 44 (1970).

Committee, representatives of organized labor took issue with certain aspects of the draft provision and proposed several changes. One of these proposals would have authorized suits against the railroads as well as Amtrak. Another would have authorized private suits by "any person adversely affected or aggrieved thereby, including the representatives of the employees of any railroad or of the Corporation." In support of the latter proposal, one labor spokesman testified that:

> "The . . . amendment we propose would modify the language of section 307 (a) . . . so as to provide that any aggrieved party, including employee representatives, could institute legal proceedings for violations of the law.
>
> . . . . . .
>
> "*As the bill now reads, only the Attorney General, except in cases involving a labor agreement, could bring such actions.*" Supplemental Hearings on H. R. 17849 and S. 3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., ser. 91–62, p. 134 (1970) (emphasis added).

The Secretary of Transportation, who was to be the primary administrative officer responsible for the implementation of the Act, sent a letter to the Subcommittee chairman commenting on these proposed changes. His letter stated that he did not object to allowing suits against railroads as well as Amtrak.[6] As to the proposal

[6] Although the Secretary did not oppose this amendment, he expressed the opinion that it might be unnecessary to make sanctions applicable to any railroad in light of other, existing statutes and in light of Amtrak's amenability to suit under § 307 (a) as it was then written.

to amend the bill to permit suits by any "aggrieved person," however, he stated:

> "Sanctions are normally imposed by the Government. Consequently, I would be opposed to permitting 'any person' to seek enforcement of section 307. I would have no objection, however, if the section were revised to permit employee representatives, as well as employees adversely affected, to seek equitable relief." Hearings, *supra*, at 85.

Thereafter, the Committee redrafted § 307 (a) in conformity with the Secretary's recommendations. The Committee's redraft and the bill as finally enacted authorized suits against railroads as well as Amtrak, and permitted suits involving labor agreements by "duly authorized employee representatives" as well as by affected employees, but did *not* authorize suits by "any person adversely affected or aggrieved."

Both the Secretary of Transportation and the representatives of organized labor thus interpreted § 307 (a) in its present form as precluding private actions other than those specifically authorized therein. Although the transcript of the House Committee hearings does not indicate that any Committee member voiced explicit affirmative agreement with this interpretation, it is surely most unlikely that the members of the Committee would have stood mute if they had disagreed with it. Especially in light of the Secretary's substantial role in the eventual implementation of the Act,[7] we cannot conclude that his interpretation of its draft provisions was not accorded significant weight by the Committee.

The members of the Committee had before them a specific proposal that would have altered the interpretation that was being placed on § 307 (a), and would have

[7] See, *e. g.*, 45 U. S. C. §§ 521, 522, 548 (c), 563 (a), 602, 621, and 645 (1970 ed. and Supp. II).

explicitly permitted suit to enforce the Act's provisions by "any person adversely affected or aggrieved." The Committee's deliberate failure to adopt that proposal, after learning of the Secretary's views, cannot but give weight to the conclusion that the Committee agreed with the Secretary's interpretation of the meaning and effect of the existing language, as well as with his opposition to the proposed change. These factors are substantial indicia that the legislators understood that § 307 (a) as written would preclude private causes of action to enforce compliance with the Act, other than in the limited area of cases "involving a labor agreement." We have found no contrary indication in any of the hearings or committee reports. Thus, the explicit legislative history of § 307 (a), such as it is, serves to support the same interpretation of its language that would be accorded by settled rules of statutory construction.

This construction of § 307 (a) is also completely consistent with the Act as a whole and with its more generalized legislative history. In outlining the purpose of the Amtrak Act, the House Report, referring to a comment by the Secretary of Transportation, noted that "[i]n order to achieve economic viability in a basic rail passenger system, . . . there will have to be a 'paring of uneconomic routes.'" H. R. Rep. No. 91–1580, p. 3 (1970). Thus, Congress concluded that "a rational reduction of present service will be required in order to save *any* passenger service." *Ibid.* (emphasis in original). In § 404 of the Act, Congress provided an efficient means whereby Amtrak could eliminate uneconomic routes (other than a "basic system" designated and from time to time augmented by the Secretary of Transportation) without the necessity of submitting to the time-consuming proceedings of state regulatory bodies or the Interstate Commerce Commission that had been required

ance procedure under the Act considerably less efficient than that which existed before, since there would no longer be a single forum that could finally determine the permissibility of a proposed discontinuance. In the place of the state or federal regulatory bodies, the Congress would have substituted any and all federal district courts through whose jurisdictions an Amtrak train might run.

Congress clearly did not intend to replace the delays often inherent in the administrative proceedings contemplated by §13a of the Interstate Commerce Act with the probably even greater delays inherent in multiple federal court proceedings.[11] Instead, it clothed the Attorney General with the exclusive (except in cases involving labor agreements) authority to police the Amtrak system and to enforce the various duties and obligations imposed by the Act. In light of the substantial scrutiny to which Amtrak operations are subject by both Congress and the Executive, Congress could quite rationally suppose that this remedy will effectively prevent and correct any Amtrak breaches of obligations under the Act.[12]

For these reasons we hold that § 307 (a) provides the exclusive remedies for breaches of any duties or obliga-

[11] The Amtrak Act was in significant part a response to congressional dissatisfaction with the administrative delays inherent in passenger route discontinuances under existing legislation. As the Senate Report observed, "trains which clearly served no useful purpose were either required to be kept in operation or were allowed to be discontinued only after protracted administrative and judicial proceedings." S. Rep. No. 91-765, p. 2 (1970). It is evident that Congress intended to eliminate the possibility of such "protracted proceedings" from the procedures it created in § 404 of the Act for efficient discontinuance of uneconomic routes.

[12] See 45 U. S. C. § 644, authorizing the Comptroller General to audit Amtrak's books and records, and § 548, requiring periodic reports to Congress and to the President concerning Amtrak's operations.

tions imposed by the Amtrak Act, and that no additional private cause of action to enforce compliance with the Act's provisions can properly be inferred.[13] Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, concurring in the result.

Although I am in agreement that the legislative history of the Amtrak Act provides a clear and convincing expression of Congress' intent to preclude any except the Attorney General and in certain situations an employee or his duly authorized representative from maintaining an action under the Act against petitioners, I would leave open the question whether a private suit for mandamus under 28 U. S. C. § 1361 might be maintained against the Attorney General if his refusal to act under § 307—even though within the letter of his authority—went "beyond any rational exercise of discretion." *United States ex rel. Schonbrun* v. *Commanding Officer, Armed Forces,* 403 F. 2d 371, 374 (CA2 1968); see Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 333–335 (1967).

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[13] Since we hold that no right of action exists, questions of standing and jurisdiction become immaterial. In finding that the respondent had standing, the Court of Appeals relied primarily upon *Data Processing Service* v. *Camp,* 397 U. S. 150 (1970). In finding jurisdiction, the court relied upon 28 U. S. C. § 1337.

MR. JUSTICE DOUGLAS, dissenting.

The Rail Passenger Service Act of 1970, 45 U. S. C. § 501 *et seq.*, authorized the creation of Amtrak to provide intercity rail passage. With "the expectation that the rendering of such [rail] service along certain corridors [could] be made a profitable commercial undertaking," the Act established Amtrak as a private-for-profit corporation. 45 U. S. C. § 541; H. R. Rep. No. 91–1580, p. 1 (1970). Amtrak has until January 1, 1975, to tender a contract to a railroad to release the latter of its entire responsibility for the provision of intercity rail passenger service. 45 U. S. C. § 564 (a). Unless a railroad has a contract with Amtrak to render the service, it may not discontinue intercity passenger service prior to January 1, 1975, "the provisions of any other Act, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, a Federal or State court, agency, or authority to the contrary notwithstanding." *Ibid.* Those intercity services are not yet a part of "the basic system" put together by Amtrak, a system which by § 202 of the Act is unique in the sense that it "shall not be reviewable in any Court."[1] 45 U. S. C. § 522.

Our problem concerns not "the basic system" created by Amtrak, but what were called on oral argument the "excess" lines that, absent a contract with Amtrak, are

[1] Amtrak may eliminate service which is part of the "basic system" only by filing notice with the ICC in accordance with the pre-Act discontinuance procedures contained in 49 U. S. C. § 13a. 45 U. S. C. § 564 (b) (3). Rail service which is undertaken by Amtrak on its own initiative but which is not part of the basic system may be discontinued at any time. 45 U. S. C. § 564 (b) (2). Excess lines, however, even though undertaken by Amtrak on its own initiative become part of the basic system and thus subject to the ICC discontinuance procedures if operated by Amtrak for a continuous period of two years. 45 U. S. C. § 563 (a).

under a congressional mandate not to discontinue "any intercity passenger train whatsoever prior to January 1, 1975." 45 U. S. C. § 564 (a).

The Court phrases the question in terms of whether a "right of action" exists, saying that no question of "standing" or "jurisdiction" is presented. Whatever the merits of the distinction between these three concepts may be in some situations, the difference here is only a matter of semantics. The District Court dismissed the cause for lack of "standing." The Court of Appeals reversed, ruling that there was "standing." The parties argue the case on the basis of "standing." Even the Solicitor General who appeared as *amicus curiae* in support of granting the petition for certiorari conceives of the issue in terms of "standing." By the Court's own admission this is not a case where all judicial review is foreclosed. For § 307 (a), 45 U. S. C. § 547 (a), does create a cause of action. May that cause of action be enforced by passengers or only by the Attorney General or by individual employees or railroad unions? Standing of passengers to sue or the existence of a cause of action in passengers is identical in that posture of the case.

Whatever the semantics, the question is whether respondent, National Association of Railroad Passengers, a national organization of railroad patrons, may bring this action to enjoin the discontinuance by Central of Georgia Railway Co.[2] of passenger trains between

[2] Central is a subsidiary of Southern Railway Co. While Central has entered into a contract with Amtrak to relieve it of responsibility for all intercity passenger service, Southern has not. Whether that failure of Southern bars the discontinuance of this passenger-train service goes to the merits of the complaint, was not passed upon below, and has no relevance to the question of standing to sue, the only issue before us.

Savannah and Atlanta, Georgia, and between Albany, Georgia, and Birmingham, Alabama.

Section 547 (a) of Title 45 U. S. C. gives the Attorney General of the United States and employees under labor agreements the power to obtain from a district court equitable relief against either Amtrak or any railroad acting in violation of the Act.[3] Petitioners argue that 45 U. S. C. § 547 (a) restricts suits to the Attorney General and to employees. That seems a strained construction. The most I think that can be drawn from the words of 45 U. S. C. § 547 (a) and the legislative history is that Congress wanted to make sure that some federal agency had some oversight over the public activity of this private-for-profit corporation. Hence the grant of standing, or cause of action, to the Attorney General. Moreover, it took out of the penumbra of aggrieved persons, employees having rights under collective agreements. Congress left untouched 28 U. S. C. § 1337 which provides that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ."

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[3] 45 U. S. C. § 547 (a) provides: "If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat."

Aggrieved passengers are the most obvious complainants when it comes to saving passenger trains from extinction. Certainly passengers of discontinued trains suffer injury in fact and are within the zone of interests protected by the Amtrak Act and thus satisfy two of the three requirements of *Data Processing Service* v. *Camp*, 397 U. S. 150. As to the third—that judicial review has not been precluded—it seems as plain to me as it did to the Court of Appeals. Where as here there is no express denial of judicial review, the test is whether "nonreviewability can fairly be inferred." *Barlow* v. *Collins*, 397 U. S. 159, 166. And, since judicial review "is the rule, and nonreviewability an exception which must be demonstrated," preclusion of judicial review "is not lightly to be inferred." *Ibid.* "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141.

The grant of jurisdiction to the Attorney General to screen state voting right procedures that might have a discriminatory effect did not, we held in *Allen* v. *State Board of Elections*, 393 U. S. 544, deprive individual citizens of standing to sue.

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and the *subdivisions thereof*. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements." *Id.*, at 556–557 (footnotes omitted).

The Attorney General is a busy person; and it is not credible to believe that a grant of power to him to sue precludes the standing of passengers who are the prime casualties when passenger service is discontinued.

Each case involving the availability of judicial review stands on its own feet. In *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, we denied judicial review since the collective-bargaining right was being protected by a neutral agency, the National Mediation Board. There is no such body standing between the passengers and Amtrak. Amtrak is a private-for-profit corporation which is only construing its own enabling Act. If passengers are denied standing to sue, Amtrak is largely on its own. Especially is this so in light of the Attorney General's own view that the grant of power in 45 U. S. C. § 547 is limited and does not authorize him to seek correction of all violations of the Act.[4] So far as I can ascertain the Attorney General has not intruded in any case.[5] To leave the complete over-

[4] In refusing to become involved in the case consolidated with this one in the Court of Appeals, the Attorney General's Office expressed the view that "the statutory mandate of section 307 (a) [45 U. S. C. § 547 (a)] does not give the Attorney General the authority to sue for a construction of the Act or to enjoin a purely technical violation." Letter from Assistant Attorney General L. Patrick Gray III to Congressman John Slack, Nov. 19, 1971, in Brief for Respondent 29, 30.

[5] As the Court of Appeals noted, the petitioners "have been unable to refer us to a single instance in which the Attorney General has either instigated or participated in litigation under the Amtrak Act, except for a few cases brought by other parties in which he intervened solely to support the defense that parties other than labor and the Attorney General did not have standing to sue." *Potomac Passengers Assn.* v. *Chesapeake & Ohio R. Co.*, 154 U. S. App. D. C. 214, 227, 475 F. 2d 325, 338 (1973). On oral argument respondent informed us of two instances in which it obtained injunctive relief against rail service discontinuance after the Attorney General declined to act.

sight to employees is to make nonreviewable most of Amtrak's decisions. Congress specifically did that when it came to "the basic group" of carriers. But its mandate not to discontinue passenger service until January 1, 1975, except on a contract with Amtrak is clear. If in that interim there can be no policing of the Act, we have given a corporation which is private and operating for a profit, an administrative absolution we seldom have been willing to conclude that Congress has bestowed even on federal agencies. I cannot believe the Congress had any such purpose.

We deal here with a federal cause of action and it is the judicial tradition "for federal courts to fashion federal law where federal rights are concerned." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 457. The fact that a private suit to enforce a federal law is not specifically sanctioned by Congress seldom means that standing to sue is foreclosed. The purpose of the Amtrak Act was to preserve and improve train service. The object was not to protect trains *per se* nor to create an *in rem* action. The purpose, which the Court in its dedication to legalisms overlooks, was to protect the people who ride the trains. The case is very much on all fours with *J. I. Case Co.* v. *Borak*, 377 U. S. 426, where Congress made it unlawful to solicit proxies in violation of rules prescribed by the Securities and Exchange Commission. No standing, no cause of action was expressly given stockholders who might suffer from corporate action pursuant to a deceptive proxy solicitation. Yet we held that the Commission was not granted an exclusive role to play in policing the area:

> "Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most

effective weapon in the enforcement of the proxy requirements. The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it." *Id.*, at 432.

The Court is in the mood to close all possible doors to judicial review so as to let the existing bureaucracies roll on to their goal of administrative absolutism. When the victims of administrative venality or administrative caprice are not allowed even to be heard, the abuses of the monsters we have created will become intolerable. The separation of powers was designed to provide not for judicial supremacy, but for checks and balances. When we turn back this respondent, we turn back passengers who are the victims of the present transportation debacle. Those who complain are not adventurers who seek personal aggrandizement as do jackals who historically have fattened on some economic debacles. The passengers are the victims of the transportation crisis out of which Amtrak seeks to make a fortune. These passengers should be heard. They satisfy the stringent test we laid down in *Baker* v. *Carr*, 369 U. S. 186; they have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . . ." *Id.*, at 204.

I would affirm the judgment of the Court of Appeals whether the rationalization be based on standing, cause of action, or jurisdiction.

SCHMIDT, DIRECTOR OF WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, ET AL. v. LESSARD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73-568. Decided January 14, 1974

The three-judge District Court's order, in a class action challenging the constitutionality of the Wisconsin statutory scheme for involuntary commitment of mental patients, that "judgment be and hereby is entered in accordance with the Opinion heretofore entered," which opinion stated that appellees were entitled to injunctive relief against further enforcement of "the present Wisconsin scheme," is sufficient as an order "granting" an injunction to invoke this Court's appellate jurisdiction under 28 U. S. C. § 1253. *Gunn* v. *University Committee*, 399 U. S. 383, distinguished. For purposes of plenary judicial review, however, the court's order does not satisfy the requirements of Fed. Rule Civ. Proc. 65 (d) that an order granting an injunction "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained . . . ."

349 F. Supp. 1078, vacated and remanded.

PER CURIAM.

In October and November 1971, appellee Alberta Lessard was subjected to a period of involuntary commitment under the Wisconsin State Mental Health Act, Wis. Stat. § 51.001 *et seq.* While in confinement, she filed this suit in the United States District Court for the Eastern District of Wisconsin, on behalf of herself and all other persons 18 years of age or older who were being held involuntarily pursuant to the Wisconsin involuntary-commitment laws, alleging that the statutory scheme was violative of the Due Process Clause of the Fourteenth Amendment. Jurisdiction was predicated on 28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983. Since both declara-

tory and injunctive relief were sought, a district court of three judges was convened, pursuant to 28 U. S. C. § 2281.

After hearing argument and receiving briefs, the District Court filed a comprehensive opinion, declaring the Wisconsin statutory scheme unconstitutional. 349 F. Supp. 1078. The opinion concluded by stating that

> "Alberta Lessard and the other members of her class are entitled to declaratory and injunctive relief against further enforcement of the present Wisconsin scheme against them. . . . [Miss Lessard] is also entitled to an injunction against any further extensions of the invalid order which continues to make her subject to the jurisdiction of the hospital authorities." *Id.*, at 1103.

Over nine months later, the District Court entered a judgment, which simply stated that

> "It is Ordered and Adjudged that judgment be and hereby is entered in accordance with the Opinion heretofore entered . . . ."

The defendants now seek to invoke the appellate jurisdiction of this Court, pursuant to 28 U. S. C. § 1253. That statute provides that

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

In response, the appellees have filed a motion to dismiss the appeal for want of jurisdiction. Relying upon this Court's decision in *Gunn* v. *University Committee to End the War*, 399 U. S. 383, they claim that the District

Court's judgment did not constitute "an order granting or denying" an injunction.

In *Gunn*, a statutory three-judge court had found a Texas breach of the peace statute unconstitutional. There, as here, the opinion of the District Court concluded by stating that the plaintiffs "are entitled to . . . injunctive relief." *University Committee to End the War* v. *Gunn*, 289 F. Supp. 469, 475 (WD Tex.). The District Court in *Gunn*, however, entered no further order or judgment of any kind; the concluding paragraph of the opinion was the only mention of injunctive relief. Thus, we concluded that we lacked jurisdiction to hear the appeal under 28 U. S. C. § 1253, because of the total absence of any order "granting or denying" an injunction.

Although the language of the District Court opinion here parallels that in *Gunn*, there is thus an important distinction between the two cases. While the record in *Gunn* was devoid of any order granting injunctive relief, there was in the present case a judgment entered "in accordance with the Opinion." Since the opinion of the District Court by its own terms authorizes the granting of injunctive relief to the appellees, we believe that the judgment here is sufficient to invoke our jurisdiction under 28 U. S. C. § 1253.

Yet, although sufficient to invoke our appellate jurisdiction, the District Court's order provides a wholly inadequate foundation upon which to premise plenary judicial review. Rule 65 (d) of the Federal Rules of Civil Procedure provides, in relevant part:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ."

The order here falls far short of satisfying the second and third clauses of Rule 65 (d). Neither the brief judgment order nor the accompanying opinion is "specific" in outlining the "terms" of the injunctive relief granted; nor can it be said that the order describes "in reasonable detail . . . the act or acts sought to be restrained." Rather, the defendants are simply told not to enforce "the present Wisconsin scheme" against those in the appellees' class.

As we have emphasized in the past, the specificity provisions of Rule 65 (d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. *International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 74–76; *Gunn, supra*, at 388–389. See generally 7 J. Moore, Federal Practice ¶ 65.11; 11 C. Wright & A. Miller, Federal Practice and Procedure § 2955.[1] Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.[2]

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[1] The record in this case suggests that a good deal of confusion has been engendered by the absence of a specific injunctive order. About six months after the opinion in this action was entered, the appellees submitted a memorandum to the District Court, alleging numerous instances of "noncompliance" with the decision and requesting affirmative judicial relief. No action was taken on this request, and, on July 18, 1973, both the appellees and the appellants joined in a "Motion to Reconvene for Clarification of Opinion." That motion outlined the uncertainty that had followed the District Court's original opinion, and asked the court to "clarify" its precise holdings. The District Court has taken no action on this joint motion, perhaps because of the subsequent filing of a notice of appeal.

[2] "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly

The requirement of specificity in injunction orders performs a second important function. Unless the trial court carefully frames its orders of injunctive relief, it is impossible for an appellate tribunal to know precisely what it is reviewing. *Gunn, supra,* at 388. We can hardly begin to assess the correctness of the judgment entered by the District Court here without knowing its precise bounds. In the absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made impossible.

Hence, although the order below is sufficient to invoke our appellate jurisdiction, it plainly does not satisfy the important requirements of Rule 65 (d). Accordingly, we vacate the judgment of the District Court and remand the case to that court for further proceedings consistent with this opinion.

Vacated and remanded.

MR. JUSTICE DOUGLAS dissents.

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one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." *International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 76.